Supreme Court, U.S.

No. 92-

In the Supreme Court of the United States

OCTOBER TERM, 1992

DANIEL L. MEDLOCK, et. al.
PETITIONERS
v.
TIMOTHY J. LEATHERS, et. al.
RESPONDENTS

CITY OF FAYETTEVILLE, ARKANSAS
INTERVENOR

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Were the Equal Protection rights of the members of the Petitioner–class of cable operators and subscribers violated by Arkansas' statutory scheme of imposing Sales Taxes, for a two year period during 1987–1989, and did the Arkansas Supreme Court misapply this Court's objective standards for Equal Protection analysis purposes, on remand, when it decided it could ignore the evidentiary record established in the case and the applicability of the law of the case doctrine; and, instead, that it could "hypothesize" an independent "rational basis" for sustaining the discriminatory imposition of Arkansas' Sales Taxes upon the subscription sales of the same television programming by cable and satellite broadcast methods?

2. For the two year period of time during 1987–1989, was the statutory scheme for imposing Arkansas' Sales Taxes, so "unduly discriminatory" against the sale of cable television services, that such statutory scheme (on its face) violated Congress' preemptive prohibition against the discriminatory levying of general taxes against cable television services (47 U.S.C. § 542(g)(2)(A))?

PARTIES TO THE PROCEEDING AND RULE 29.1 STATEMENT

Petitioners are cable television operators and subscribers who are representatives of a certified class of taxpayers that were subjected to the state and local Sales Taxes imposed by Act 188 of 1987, until amended by Act 769 of 1989, and include the following named Plaintiffs:

Petitioner Daniel L. Medlock is an individual, a subscriber to cable television services, and a resident of Little Rock, Pulaski County, Arkansas.

Petitioner Community Communications Company is an independent corporation that has no subsidiaries or affiliates, and which operates six cable television franchises in south and southeast Arkansas.

Respondents are state or local officials of governmental entities wherein a Sales Tax is imposed and who are defendants in their official capacities, as follows:

Respondent Timothy J. Leathers is the Commissioner of Revenues of the Revenue Division of the Arkansas Department of Finance and Administration and the person who is charged by statute with administering the state and local Sales Taxes imposed in Arkansas.

Respondent Jimmie Lou Fisher is the Treasurer of the State of Arkansas and the person who is charged with disbursing funds to state agencies and to county and municipal governmental entities.

Respondents F. G. "Buddy" Villines and Patricia Tedford are the County Judge and Treasurer, respectively, of Pulaski County, Arkansas, a county wherein a county–wide local Sales Tax is imposed.

Respondent Joann Boone is the Treasurer of the City of Benton, Arkansas, a municipality wherein a local municipal Sales Tax is imposed.

Respondent City of Fayetteville, Arkansas, an intervenor, is a municipal corporation wherein a local municipal Sales Tax is imposed.

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

Daniel L. Medlock, et. al., respectfully petition for a Writ of Certiorari to review the judgment entered by the Supreme Court of Arkansas, on remand from this Court's earlier decision in this case.

OPINIONS

The Opinion of the Supreme Court of Arkansas (App. A, *infra*, 1a), on remand from this Court's earlier decision, is reported at 311 Ark. 175, 842 S.W. 2d 428. This Court's earlier decision in this case is reported at 111 S.Ct. 1438 (1991), and the original decision of the Arkansas Supreme Court in this case (App. B, *infra*, 11a) is reported at 301 Ark. 483, 785 S.W. 2d 202. The

Order of the Supreme Court of Arkansas denying the Petition for Rehearing is unreported (App. E, *infra*, 31a).

The Order and Judgment (App. C, *infra*, 17a) and Opinion (App. D, *infra*, 19a) of Chancellor Lee A. Munson of the Pulaski County Chancery Court are unreported.

JURISDICTION

The judgment of the Supreme Court of Arkansas (App. A, *infra*, 1a) was rendered on November 23, 1992, and a timely Petition for Rehearing was filed by the Petitioners and such petition was denied on January 11, 1993 (App. E, *infra*, 30a). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution:

Article 6, clause 2. This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding.

Amendment 14. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statutes:

The pertinent and applicable provisions of the Cable Communications Policy Act of 1984 (47 U.S.C. § 542) and the Arkansas Gross Receipts [Tax] Act of 1941, as amended (Ark. Code Ann. §§ 26-52-101 and 301), are set forth, *infra*, as App. F, 32a, and App. G, 33a, respectively.

STATEMENT OF THE CASE

This is the second time that this case has been before the Court on a Petition for Certiorari. The initial appeal resulted in this Court's decision in *Leathers v. Medlock*, 111 S.Ct. 1438 (1991), wherein this Court partially reversed and partially affirmed the Arkansas Supreme Court's initial decision. This Court held that the discriminatory imposition of Arkansas' state and local Sales Taxes upon the subscription sale of television programming by cable television operators (while *not* imposing the same Sales Tax upon the subscription sale of identical television programming by "scrambled" satellite television broadcast providers) did *not* rise to the level of violating the cable operators' and subscribers' First Amendment protected rights of "free press" and "free speech." However, the members of this Court, *sua sponte*, remanded this case to the Arkansas Supreme Court for further consideration of whether the statutory scheme for levying state and local Sales Taxes created by Act 188 of 1987 violated the Petitioners' Equal Protection rights for a two year period of time. On remand, the Arkansas Supreme Court also allowed the Petitioners to fully brief and argue their Supremacy Clause argument.

On remand from this Court's decision, the evidentiary record was not supplemented, only additional briefing on the two other constitutional bases was submitted, and the case was argued orally. The Arkansas Supreme Court decided, on remand, that there was no violation of the Petitioners' Equal Protection rights; that there was a "rationale basis" for the discriminatory levy of Arkansas Sales Taxes for the two year period during 1987-1989; and that there was a factual difference in the classification of the

delivery of television programming services by cable television operators, and by "scrambled" satellite television broadcast providers. Petitioners' Petition for Rehearing was denied, and this second Petition for Certiorari was timely filed with this Court.

Prior to July 1, 1987, Arkansas' statutory scheme for imposing state and local Sales Taxes did *not* impose these taxes upon the sale of either cable television subscription services or "scrambled" satellite television broadcast services. By adoption of Act 188 of 1987 (Ark. Code Ann. § 26-52-301(3)(D), App. G *infra*, 33a), the Arkansas General Assembly began to impose Arkansas' state and local Sales Taxes upon charges made by cable television operators in return for their providing of cable television subscription services to their individual Arkansas subscribers. For the two year period from July 1, 1987, through June 30, 1989, *only* the sales of cable television services were subjected to Arkansas' Sales Taxes, while the sale of the identical television programming services by "scrambled" satellite broadcast television providers to their Arkansas subscribers was *not* subjected to these same excise taxes.

On March 21, 1989, the Arkansas General Assembly adopted Act 769 of 1989 (Ark. Code Ann. § 26-52-301(3)(D), App. G *infra*, 33a), to amend the provisions of Act 188 of 1987, to also extend the coverage of the state's Sales Taxes to charges made by out-of-state providers of "scrambled" satellite television broadcast subscription services. However, Act 769 did *not* amend Arkansas' Compensating (Use) Tax statues, only it's Sales Tax statutes. Therefore, subscription fees paid for "scrambled" satellite television broadcast services provided to subscribers located in Arkansas are still *not* subject to Arkansas' Compensating (Use) on payments made by the Arkansas subscribers directly to the out-of-state providers. Under the 1989 amendment to the Arkansas Sales Tax Act, the only additional subscription fees charged for "scrambled" satellite television broadcast services that were subjected to Arkansas' Sales Taxes are those that are paid by the local subscriber to an in-state collecting agent, e.g., a cable operator, acting on behalf of the out-of-state located provider of the "scrambled" satellite broadcast television services.

The evidentiary record in this case indisputably establishes that exactly the same television programming services are sold by cable television operators to their Arkansas subscribers and by out-of-state located "scrambled" satellite television broadcast service providers to their Arkansas customers. The television programming in question was originated by beaming it directly from geostationary satellites located some 23,000 miles out in space. This television programming is beamed directly from the satellite to the cable operator's earth station antenna where it is picked up at the cable operator's headend, "decoded," and distributed over coaxial cables directly to the convertor boxes on the subscribers' television sets. Likewise, the same television programming that is beamed from the geostationary satellite is picked up by the Arkansas satellite subscriber's backyard dish antenna, it travels over a shorter coaxial cable, through the subscriber's "descrambler" or "decoder" and to the subscriber's television set. [1] Thus, the same television programming that is supplied by the program originator is available to both the cable operator and the home-dish subscriber.

Testimony established that a number of the Arkansas cable operators acted as collecting agents for the out-of-state located "scrambled" satellite providers, and during the two year period in question, Arkansas Sales Taxes were *not* imposed upon the sale of "scrambled" satellite subscription services, but such Sales Taxes

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[1] The Petitioner's submit that Special Justice Mourton of the Arkansas Supreme Court committed clear error (842 S.W. 2d, at 431-432) when he held that "scrambled" satellite providers and cable operators "transmit their signals to viewers in different ways; therefore, a distinguishable classification at the initial stage of programming exists." The Special Justice cited no authority for, and no evidence to support, this important Equal Protection holding. The Petitioners' respectfully submit that none exists; that the television programming picked up by the cable operator or the "scrambled" satellite subscriber is exactly the same. Both the cable operator and the "scrambled" satellite subscribers are assigned their own codes that "descramble" the television signals received from the geostationary satellites, and convert them into viewable pictures at the same time. Thus, the Petitioners' submit, there is no difference in the television programming provided by, or available to, cable operators or "scrambled" satellite providers for their respective Arkansas customers.

were imposed upon the subscription fees the cable operator charged for the programming services that he sold to his Arkansas customers. This discriminatory method of imposing the Arkansas Sales Taxes for this two year period of time was confirmed as the proper method for administering Act 188 of 1987 by the testimony of the Manager of the Sales and Use Tax Section of the Arkansas Department of Revenue and Administration.

In late May of 1987, before the Sales Taxes imposed by Act 188 of 1987 became effective, Daniel L. Medlock, a cable television subscriber, and Community Communications Company, a cable television operator with six (6) franchise systems in Arkansas, instituted this class action suit in Pulaski County Chancery Court to contest the constitutionality of the Sales Taxes imposed only upon subscription fees charged for cable television services by Act 188 of 1987. Petitioners' Complaint alleged, among other things, that these cable television services were singled out from among other businesses that were involved in the electronic segments of the mass communications media, for the imposition of these state and local Sales Taxes. Among their causes of action, the Petitioners alleged that the adoption of Act 188 of 1987 violated: (1) their rights to Equal Protection of the laws, under the provision of the Fourteenth Amendment to the United States Constitution, and (2) the Supremacy Clause of the United States Constitution, because Congress had preempted this area of the law by stating (in the Cable Communications Policy Act of 1984) (47 U.S.C. § 542(g)(2)(A)) that no state or local taxes of general applicability could be imposed in an "unduly discriminatory" manner against the sale of cable television services.

Petitioners' suit was certified as a class action. At the various pretrial evidentiary hearings and at the trial of this case, extensive oral testimony and documentary was introduced by the Petitioners regarding the operation of cable television systems; the operation of "scrambled" satellite television broadcast systems; the television programming available on both of these methods of delivery; and how these two types of television delivery services

are important parts of the electronic segment of the mass communications media.

In his decision, entered on March 10, 1989, the trial court Chancellor made extensive Findings of Fact and Conclusion of Law (App. D *infra*, 19a) wherein he held that cable television operators and subscribers were entitled to claim the First Amendment protected rights of "free press" and "free speech," but the Chancellor held that the First Amendment rights of the Petitioners were *not* violated by the statutory scheme of imposing Arkansas Sales Taxes that was created by the adoption of Act 188 of 1987. However, the Chancellor's Findings of Fact and Conclusion of Law did *not* address the Petitioners' Equal Protection or Supremacy Clause arguments. Instead, in the Chancellor's Order and Judgment entered on March 13, 1989 (App. C *infra*, 17a), the Chancellor made a "summary" finding "that Act 188 of 1987 is constitutionally valid, both facially and in its application, as against the First Amendment and Equal Protection challenges of plaintiffs; and ... said law ... does not violate ... any provisions of the Cable Communications Policy Act of 1984." [2]

The Arkansas Supreme Court addressed *only* the Petitioners' First Amendment based arguments in its original decision on appeal in this case, and that court did *not* reach either of the Petitioners' alternative Equal Protection or Supremacy Clause arguments. In partially reversing the Arkansas Supreme Court's determination that Act 188 of 1987 was unconstitutional, until amended by Act 769 of 1989, this Court, relying upon the Arkansas Supreme Court's determination that the sale of cable television subscription services and "scrambled" satellite television subscription services were "similarly situated services," found that Arkansas' extension of its generally applicable Sales Taxes to cable television services alone, and not to "scrambled" satellite services, did *not* violate the Petitioners' First Amendment rights. This Court

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[2] These are the *only* findings of the trial Court with regard to the Equal Protection Clause or the Supremacy Clause arguments raised by the Petitioners, as alternatives to their First Amendment based arguments.

then, *sua sponte*, remanded this case to the Arkansas Supreme Court for consideration of the Equal Protection question for the two year period prior to the passage of Act 769 of 1989.

On remand, for consideration of the two year period of time during which Act 188 of 1987 was in effect, there was no additional evidentiary hearing; only further briefing and oral argument of the Equal Protection and Supremacy Clause issues before the Arkansas Supreme Court. The respondent state officials did *not* raise, discuss, or offer, on brief, *any* "state purpose" or "rational basis" to justify the discriminatory imposition of Arkansas state and local Sales Taxes for the two year period from July 1, 1987 through June 30, 1989, other than the general need to raise revenue. During oral argument, the counsel for Respondent Leathers did raise some alleged reasons why the Arkansas General Assembly adopted Act 188 of 1987 to impose the state's Sales Taxes *only* upon the sale of cable television subscription services, but such counsel for the Respondents relied most heavily on what he referred to as the duty of the court to "hypothesize" a "rational basis" to uphold the taxing statute. This "hypothesizing" duty is a standard adopted by the Arkansas Supreme Court in several of its earlier decisions. [3]

In its Opinion, on remand, the Arkansas Supreme Court reaffirmed that it had a duty to "hypothesize" any conceivable "rational basis" that would sustain the taxing scheme against an Equal Protection Clause challenge. The court also held that it could go outside of the evidentiary record to determine such a "rational basis;" and it found that the General Assembly could have determined that it wanted to encourage the sale of "scrambled"

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[3] See also the critical comments of Justices Glaze, Newbern, and Brown of the Arkansas Supreme Court concerning the state's failure to raise or argue *any* "rational basis" for the discriminatory scheme created by Act 188 of 1987 for imposing Arkansas' Sales Taxes for this two year period of time. (App. H, *infra* 35a–45a). See also, the Arkansas Supreme Court's written comments regarding the state's failure to raise *any* "rational basis" for this discriminatory scheme of taxation. *Medlock v. Leathers*, 311 Ark. 175, 842 S.W.2d 428, at 432–433 (Ark., 1992) App. A, *infra*, 7a–8a.

satellite services in rural areas of Arkansas where cable services might not be available. The court therefore denied the Petitioner's constitutional challenges based on both the Equal Protection and Supremacy Clauses, and affirmed the Pulaski Chancery Court's decision in this case. The Arkansas Supreme Court subsequently denied the Petitioners' timely filed Petition for Rehearing.

REASONS FOR GRANTING THE PETITION

The Petitioners submit that, on the two federal constitutional questions presented by this case, there is a conflict between the opinion here by the Arkansas Supreme Court, and opinions by other state and federal appellate courts regarding the proper application of the "rational basis" test in applying the Equal Protection Clause standards in challenges to state taxes generally, and particularly to the burgeoning group of new services provided by the electronic segment of the mass communications media. Thus, important reasons, as described in Rule 10.1(a) and (b) of this Court's Rules, exist for this Court to grant the Petition for Certiorari in this case, since the answers to the questions presented can only be supplied by a ruling of this Court. These questions are of great national importance, not only in the administration of the Sales Tax laws of the various states, but also in the very regulation and operation of cable television systems throughout the country, as evidenced by this Court's prior decision in this *Medlock* case, and in the Court's consideration of the same Equal Protection issue in the case of *FCC v. Beach Communications, Inc.*, Docket No. 92-603, now pending decision by this Court.

The Petitioners acknowledge that Arkansas has the power to impose a Sales Tax upon charges made for cable television services, but they allege that, for the two year period during 1987-1989, Arkansas' statutory scheme for imposing its Sales Taxes did not impose such excise taxes equally upon similarly situated members of the same class of television service providers and subscribers. Thus, the Petitioners submit that Arkansas' Sales Tax scheme singled them out for taxation, while not imposing the same excise taxes upon other similarly situated businesses and television

subscribers who should be considered as being in the same classification of taxpayers, for Equal Protection purposes.

The Arkansas Supreme Court's statement in its decision that the court had a duty that requires it to "hypothesize" *any* "rational basis" for sustaining the statutory scheme that discriminatorily imposed the Sales Taxes in this case is a clearly erroneous determination by that inferior court. Such ruling totally disregards this Court's previously determined "objective standards" that are mandated to be used for Equal Protection analysis purposes. The Arkansas Court has also ignored the well established "law of the case doctrine," on remand, in determining that cable television services are not similarly situated to "scrambled" satellite television broadcast services. [4] This "hypothesizing" standard or duty adopted by the Arkansas Supreme Court is in direct conflict with the proper Equal Protection analysis set forth in decisions of the appellate courts of Arkansas' sister states involving challenges to the statutory schemes for taxing the electronic segment of the mass communications media.

Forty–five states and the District of Columbia impose some sort of Sales Taxes (or gross receipts based excise taxes) upon the sale of goods and services, and many thousands of local governmental entities impose local option Sales Taxes or gross receipts based service, telecommunications or amusement excise taxes. The amount of challenged taxes that may be subject to refund in this case alone exceeds more than $11.0 million, and that figure must be multiplied many times in analyzing the amount of gross receipts based excise taxes raised from the taxation of cable television services by state and local governments that have substantially more populous venues than Arkansas.

Thus, the Petitioners submit that the federal constitutional questions presented here are of substantial national importance to

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[4] Prior to the Arkansas Court's decision, on remand in this case, both the Arkansas Court and this Court had consistently found and accepted, without dispute, that cable and satellite television subscription services were similarly situated, for constitutional analysis purposes.

the thousands of businesses and millions of subscribers that are involved in, or affected by, the operation of cable television services, and also to a vast number of state and local governments. Therefore, these questions should be addressed by the Court in this case, to settle the apparent conflict among the inferior courts on the important issues of federal constitutional law that are presented.

I.

A CONFLICT EXISTS BETWEEN THE DECISION IN THIS CASE AND DECISIONS BY OTHER FEDERAL AND STATE APPELLATE COURTS IN EQUAL PROTECTION CLAUSE BASED CHALLENGES TO STATE TAXES AND CABLE TELEVISION REGULATION AND THE DECISION OF THE ARKANSAS SUPREME COURT, ON REMAND IN THIS CASE, IS ERRONEOUS.

The Petitioners acknowledge that this Court's previous decisions have long ago established, in taxpayers' Equal Protection based challenges to state taxes, that great deference and wide latitude will be given by the Court to the state legislatures' decisions to create different classifications of taxpayers to meet local economic and regulatory needs; that the classifications will be presumed constitutional and approved if the Acts advance a legitimate state purpose and the resulting classifications are reasonably related to that state purpose; that the classifications do not have to be drawn with mathematical precision; and, finally, that a heavy burden is placed upon the challenging taxpayer to establish that the questioned classifications are palpably arbitrary and do not advance a legitimate state purpose. See, *Nordlinger v. Hahn*, 112 S.Ct. 2326 (1992); *Allegheny Pittsburg Coal Co. v. County Commissioner*, 488 U.S. 336 (1989); *City of New Orleans v. Dukes*, 427 U.S. 297 (1976); *Lenhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973); *Allied Stores of Ohio v. Bowers*, 358 U.S. 522 (1959); *Madden v. Kentucky*, 309 U.S. 83 (1940); and *Carmichael v. Southern Coal Co.*, 301 U.S. 532 (1937).

Though the Petitioners acknowledge that the violation of the Equal Protection Clause by a state tax is probably the hardest constitutional issue for a challenging taxpayer to establish, they submit that there are still "objective standards" that the challenged tax statute must meet under the "rational basis" or "minimum scrutiny" test delineated by this Court's prior decisions. To pass constitutional muster, the classification created by the statutory scheme of taxing must be reasonable, not arbitrary; it must rest upon some ground of difference having a fair and substantial relation to the object or purpose of the legislation; the classification cannot be palpably arbitrary, feigned or illusory; and the ultimate controlling issue is whether all taxpayers that are within the classification created are treated alike. *Allegheny Pittsburg Coal Co. v. County Commissioner*, *supra*; *Allied Stores of Ohio*, *supra*, 358 U.S. at 527; *Walters v. City of St. Louis*, 347 U.S. 231, at 237 (1954); and *Royster Guano Co. v. Virginia*, 253 U.S. 412, at 415 (1920).

There have been a number of previous decisions rendered by this Court where state or local taxes were declared to have violated the provisions of the Equal Protection Clause, whether because: (1) there was no legitimate state purpose served by the classification (*Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985); *WHYY v. Glassboro*, 393 U.S. 117 (1968); and *Wheeling Steel Corp. v. Gladner*, 337 U.S. 562 (1949); or (2) the classification was found to be palpably arbitrary, feigned or illusory, and therefore not reasonably related to an otherwise legitimate state purpose. (*Allegheny v. Pittsburg Coal Co.*, *supra*; *Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Williams v. Vermont*, 472 U.S. 14 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Stewart Dry Goods Co. v. Lewis*, 294 U.S. 550 (1935); and *Royster Guano Co. v. Virginia*, 253 U.S. 419 (1920)).

The Petitioners submit that the classification of taxpayers and taxed television services created by Act 188 of 1987 clearly fails any proper application of the two part "rational basis" test laid down by this Court, especially since it was originally and properly decided in this case that: (1) cable television operators and subscribers, and (2) "scrambled" satellite television providers and

subscribers were "similarly situated" (i.e., within the same classification for constitutional analysis purposes). On remand in this case, the Arkansas Supreme Court: (1) totally ignored the facts established in the evidentiary record; (2) disregarded the applicability of the controlling "law of the case doctrine;" and (3), most importantly, erroneously held that it had duty to "hypothesize" any conceivable "rational basis" to sustain the challenged statutory scheme of taxation. Therefore, the Petitioners respectfully submit that the decision by the lower court, on remand in this case, has so far departed from the accepted standards established by this Court, that a review and reversal by this Court is called for as an exercise of its general supervisory powers.

a. Conflict With Decision Of Federal Appellate Court

The Petitioners submit that the erroneous application of the "rational basis" test by the Arkansas Supreme Court, on remand in this case, is in direct conflict with the proper application of the "rational basis" test by the Court of Appeals for the District of Columbia in the case of *Beach Communications, Inc. v. F.C.C.*, 959 F.2d 975 (C.A.D.C., 1992) (Beach I), and *Beach Communications, Inc. v. F.C.C.*, 965 F.2d 1103 (C.A.D.C., 1992) (Beach II). The *Beach* I and II case struck down part of the Cable Communications Policy Act of 1984 and the applicable FCC regulations, because the District of Columbia Court of Appeals found that there was no "rational basis" for distinguishing between the classification of similarly situated SMATV (cable) operators based solely upon whether the buildings these SMATV operators served were under common or separate ownership. This Court granted the government's Petition for Certiorari in the *Beach* case [5] and that case was orally argued to the court on March 29, 1993, and the Equal Protection question presented there is now pending decision by this Court.

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[5] *F.C.C. v. Beach Communications, Inc.*, U.S. Sup. Ct., Docket No. 92–603, 113 S. Ct. 594 (1992).

Though the *Beach* I and II case involves regulation of cable television by the government, instead of taxation of cable television by the government, the Petitioners submit that the same basic Equal Protection issues are involved in both cases; i.e., the proper application of this Court's "rational basis" test. The Petitioners submit that the "rational basis" test was properly applied in the *Beach* case and improperly applied by the Arkansas Supreme Court, on remand in this case, in factual settings that are so similar that they should be considered indistinguishable. This Court should grant the Petition for Certiorari here to use this case as a vehicle for further clarification of the federal constitutional limits imposed upon states in the taxation of the sale of the multitude of "new" communication services that appear to be evolving almost daily in the electronic segment of the mass communications media.

b. Conflict With Decisions Of Other State Appellate Courts

The Petitioners submit that the decision of the Arkansas Supreme Court, on remand, in this case, also conflicts directly with the decision of the Wisconsin Supreme Court in the case of *GTE Sprint Communications Corp. v. Wisconsin Bell, Inc.*, 454 N.W.2d 797 (Wis., 1990), regarding the proper interpretation and application of Equal Protection standards in a challenge to a general Sales Tax imposed upon charges made for telephone services. The earlier Equal Protection decision of the Arkansas Supreme Court in *Bosworth v. Pledger*, 305 Ark. 598, 810 S.W.2d 918 (Ark., 1991) *cert. denied*, 112 S. Ct. 617 (1991), is also in direct conflict with this *GTE Sprint* decision by the Wisconsin Supreme Court. However, the Arkansas Supreme Court has gone even further afield in its decision, on remand in this case, than it did in the earlier *Bosworth* case, in misapplying the "rational basis" analysis required by this Court's prior decisions interpreting the Equal Protection Clause. In the *GTE Sprint* case, Wisconsin's statutory scheme imposed the state's general Sales Tax upon "access fees" charged by LECs to IXCs, but *not* upon charges for the same "access fees" made by the LECs to "resellers" or other LECs. The practical effect of this statutory scheme was to grant a competitive advantage to the "resellers" over the IXCs, solely

because of the Sales Tax expense. A similar competitive situation was created in this case between cable and "scrambled" satellite operators, solely because of the passage of Act 188 of 1987.

In the *GTE Sprint* decision, the Wisconsin Supreme Court considered and applied *all* of the proper presumptions mandated by this Court's decisions in *Madden*, *supra*; *Allied Stores of Ohio*, *supra*; and *Allegheny Pittsburgh Coal Co.*, *supra*; but that Court also recognized and applied the "objective standards" set forth by this Court's decision in *Walters v. City of St. Louis*, *supra*. In applying these objective standards to the three purposes offered by the state revenue department to justify the discriminatory imposition of the states's general Sales Tax, the Wisconsin Supreme Court found that there was nothing unique about the sale of access services to IXCs, resellers and other LECs; that all such businesses should be considered to be in the same class for purposes of this Equal Protection Clause challenge; and that the classifications created by the challenged Sales Tax statute were totally arbitrary and violated the Equal Protection rights guaranteed to GTE Sprint, as an IXC. The remedy ordered by the Wisconsin Supreme Court was a refund and abatement of any further Sales Taxes against GTE Sprint and the other IXCs.

Similarly, the Petitioners submit that the decision of an Illinois intermediate appellate court in the case of *Satellink of Chicago, Inc. v. City of Chicago*, 523 N.E.2d 13 (III. App. 1 Dist., 1988), is in *direct* conflict with the Equal Protection analysis of the Arkansas Supreme Court in this case. In the *Satellink* case, the operator of a SMATV subscription television service was found to have had its Equal Protection rights violated by the provisions of Chicago's 4% gross receipts based amusement tax ordinance that imposed this local excise tax upon charges made for the delivery of television programming services by the SMATV operator, but specifically excluded from the tax base charges made by cable television operators in providing the same television programming. The Illinois appellate court conducted a detailed Equal Protection analysis, considered and applied *all* of the presumptions of statutory validity and burden of proof required by this Court's decisions, and, like the Wisconsin Supreme Court in

the *GTE Sprint* case, the Illinois court also noted and applied the "objective standards" set out by this Court in its *Royster Guano Co.* decision, *supra*. The Illinois court found that there was no significant difference in the television programming service offered by the SMATV operator and the cable operator, and that the classification created by the City of Chicago's ordinance had no "rational basis" and, therefore, violated the SMATV operator's Equal Protection rights. The Illinois court made it clear that its decision to hold the local excise tax unconstitutional was made under the provisions of the Equal Protection Clause of the Fourteenth Amendment (not under the "free press" and "free speech" clauses of the First Amendment), and that the "minimum scrutiny" (rational basis) test had been utilized. [6]

Therefore, the Petitioners submit that there is a clear and direct conflict between the decision by the Arkansas Supreme Court here, and the decisions by the appellate courts of Arkansas' sister states, as to the proper application of Equal Protection standards where taxpayers are challenging taxes imposed upon services rendered in this ever evolving technological area of electronic communication. This Petition for Certiorari should be granted, so as to allow the Court to set more exacting standards that can be applied in instances involving these "new" communication services sold by these burgeoning electronic communication industries.

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[6] The Petitioners submit that the supreme courts of a number of Arkansas' sister states have also recently rendered decisions holding various of their respective states' taxes to have violated Equal Protection Clause standards, where these other state courts have also applied the required "objective standards" to make sure that all taxpayers within the same class were treated equally. See, *Northern Natural Gas Co. v. Board of Equalization and Assessment*, 443 N.W.2d 249 (Neb., 1989); *Amex Magnesium Corp. v. State Tax Commission*, 496 P.2d 1256 (Utah, 1990); and *Associated Grocers, Inc. v. State*, 787 P.2d 22 (Wash., 1990), *cert. denied, Washington v. Associated Grocers, Inc.*, 111 S. Ct. 670 (1991). See also, the "pending" cases cited in footnote 8, *infra*.

c. The Issue Presented Here Is Important To All States In The Administration Of Their Sales Taxes On Cable Television And Other Electronic Communication Services.

Within the last twenty years, there has been a virtual explosion in new methods and means of electronic communication, both in the telecommunication and broadcast industries. These "new" services include satellite and cable transmissions of television services, and the wireless transmission of telephone services by satellite and cellular means. These "new" types of electronic communication services have generated whole new industries, and charges are made for many "new" classifications of these services that did not even exist twenty years ago. Many state and local governments, in their search for new revenues, are beginning to apply both general and special excise taxes upon the sales of some or all of these "new" communications services. There has been no decision rendered by this Court, to date, involving an Equal Protection challenge to the various statutory schemes for imposing general or special taxes upon these "new" communications services. The Court chose this *Medlock* case as a vehicle for announcing First Amendment standards that were applicable in such situations, and then, *sua sponte*, remanded this case for the Arkansas Supreme Court's further consideration of the Petitioners' Equal Protection challenge to these same Sales Taxes. Because the court below so erroneously applied the required Equal Protection standards, and, in effect, engaged in "mere speculation" (at the Respondents' invitation) to "hypothesize" a "rational basis" to sustain the discriminatorily imposed Sales Taxes, this Court should again use this case as its vehicle in further clarifying the Equal Protection limitations on the taxation of these new industries by state and local governments.

As with the lower court's approval, on remand, of the discriminatory taxation of cable and satellite television subscription services in this *Medlock* case (where the state courts *originally* held that the same television programming was provided to the subscribers of *both* cable *and* "scrambled" satellite services in virtually the same manner), the Arkansas Supreme Court's establishment of a duty to "hypothesize" any reason to uphold the

discriminatory taxation of electronic communication services, e.g., the long distance interstate telephone services that are provided over exactly the same equipment, transmitting the same voice, data and image messages in the *GTE Sprint* and *Bosworth* cases; has resulted in creating a real conflict with the decisions of other state appellate courts on virtually the same Equal Protection issues.

This situation has left a real question pending as to the proper limitations on state and local taxation of these "new" electronic communication services, in Arkansas and these other jurisdictions. The Petitioners submit that the federal constitutional limitations on a state's power to tax should *not* vary from state to state, where the same services will be taxed differently in each state, depending upon how the various states' supreme courts interpret and apply the Equal Protection Clause limitations. It is the exclusive province of this Court to set such constitutional guidelines.

This Court should also note that some states have now begun to adopt statutes that impose their general Sales Taxes upon charges for "premium" and "pay per view" cable television services, but *not* upon charges for "basic" cable services.[7] Similar gross receipts based excise taxes have also led to the filing of several other Equal Protection based court challenges to this type discriminatory taxation of cable television operators and their subscribers. See, *Cox Cable of Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 410 S.E.2d 652 (Va., 1991).[8]

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[7] See, for example, Tenn. Code Ann. § 67-6-212, effective May 31, 1987, and Act 22 of 1991, § 43, Pennsylvania General Assembly, effective October 1, 1991.

[8] Similarly Equal Protection Clause based challenges to state or local taxes are now also pending in the cases of *Rancho Santa Margarita Cablevision, et. al. v. Bradley*, Orange County, California Superior Court, Docket No. X-62-56-69 (11 cable operators are contesting property tax assessments); *UACC Midwest, Inc. v. Indiana Department of State Revenue*, Indiana Tax Court, Docket No. 49T109204-TA-0012 (a cable operator is challenging Indiana's discriminatorily imposed gross receipts income tax); and *Storer Communications of Jefferson*

Writing for the majority, in *Williams v. Vermont*, *supra*, 472 U.S. at 28, Justice White noted that: "The dominant theme running through all state taxation cases is the concern with the actuality of operation." See also, *Halliburton Oil Well Co. v. Reily*, 373 U.S. 64, at 69 (1963). In *Halliburton*, this Court also specifically noted that "equality for purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." 373 U.S. at 70. The Petitioners submit that the same type of competitive imbalance existed in Arkansas from July 1, 1987 through June 30, 1989, solely because of the statutory scheme of Sales Taxes created by Act 188 of 1987, and that the different classification of cable and "scrambled" satellite providers and subscribers by the Arkansas Supreme Court, on remand, for Equal Protection purposes, was palpably arbitrary, invidious, capricious, feigned, and illusory. In turn, this erroneous action by the Arkansas court was based upon a misguided duty it stated it has to "hypothesize" (i.e., speculate) any "rational basis" to sustain the challenge tax. The Petitioners submit that this erroneous determination by the Arkansas court is a serious breach of this Court's previously established "objective" guidelines that the lower courts should apply for Equal Protection analysis purposes.

d. The Arkansas Supreme Court's Decision Fails, On Remand, To Apply Any Of The Objective Equal Protection Standards Mandated By This Court's Prior Decisions

In the last decade, the Arkansas Supreme Court has decided three cases involving challenges to state or local taxes based upon the Equal Protection Clause, [9] and that court has denied all three of the taxpayers' challenges. In each of these cases, and especially on remand in the instant case, the Arkansas

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County v. Oldham County Board of Education, Oldham County Kentucky Circuit Court, Docket No. 90-IJ-494 (cable operators are challenging Kentucky's local option gross receipts based utility user taxes that are imposed only upon cable television operators and subscribers).

[9] See, *Streight v. Ragland*, 655 S.W.2d 459 (Ark., 1983); *Bosworth v. Pledger*, *supra*, and the instant *Medlock* case, on remand.

Supreme Court has emphasized that it believes that the lower court has a duty, supposedly created under this Court's decision in *Carmichael v. Southern Coal Co., supra*, to "hypothesize" any legitimate basis (even one outside of the evidentiary record in the case) that the Arkansas General Assembly "could have considered" in making the discriminatory classification in its various taxing statutes (810 S.W.2d at 923; 842 S.W.2d at 431). The Petitioners respectfully submit that this "hypothesizing" standard adopted by the Arkansas Supreme Court has led the Arkansas Court to totally ignore, override, and disregard the required "objective standards" that are to be applied in Equal Protection challenges, as outlined by this Court's prior *Allied Stores of Ohio, supra; Walters v. City of St. Louis, supra; and Royster Guano Co., supra;* decisions.

The Petitioners respectfully submit that this erroneous action by the Arkansas Supreme Court has resulted in this "hypothesizing" activity becoming a "subjective" standard where the appellate court actually becomes an active participant in the case on the side of the taxing entity. Under these circumstances, the challenging taxpayer can never hope to succeed in meeting his burden of proof in an Equal Protection challenge. The taxpayer must not only negate the "purposes" proffered by the state itself, but the taxpayer must also try and anticipate *any* purposes that could be "hypothesized" by the Arkansas court, after the case is submitted for decision. The Petitioners' submit that, under a proper application of the Equal Protection analysis standards, both the "state purpose" and the "rational basis" must, at least, be suggested by the taxing entity; so as to give the challenging taxpayer the opportunity to meet his burden of proof at the evidentiary hearing in the trial court. See, *Metropolitan Life Ins. Co. v. Ward, supra*. Here, the State of Arkansas' *only* reason proffered for the differential taxation of cable and "scrambled" satellite providers by Act 188 of 1987 was the raising of revenue. In fact, the State of Arkansas defaulted completely in offering any "rational basis," on remand, to try and sustain the challenged Sales Taxes.

In discussing this procedural failure of the state, during oral argument, on remand, the following colloquy took place

between several Justices of the Arkansas Supreme Court and the counsel for Respondent Leathers (App. H, *infra*, 40a–43a):

> **JUSTICE GLAZE:** He [Mr. Sayre] believes that there ought to be some sort of evidence in the record somewhere by the state -- and I don't really even see in your brief -- I saw in Mr. McCord's brief that he raised some sort of legitimate purpose in it, but you don't seem to even attempt to address that point, which I think is kind of crucial, at least on the Equal Protection part. I sure hope you deal with that --
>
> **MR. PRUETT:** The reason that it was not dealt with in the brief was that we knew that we would be here arguing based on past consideration of this case by the Supreme Court, and we decided that we would submit our Equal Protection rational bases in the oral argument. So, to answer your question, Justice Glaze, it is a matter of strategy more than anything else. But there are --
>
> * * *
>
> **JUSTICE GLAZE:** Could I ask you a question at this point -- and you're right on the points that I'm interested in, but the two purposes or rationale that have now been offered; should there be some sort of evidence presented by the parties below? Should we not have had some of the development of the purpose background for us to review up here, rather than to let the parties for the first time get before us, and then we have to hypothesize, as our language is expressed, some rationale?
>
> **MR. PRUETT:** And again, that goes to Mr. Sayre's development of his First Amendment

Argument almost exclusively at the trial court level.

JUSTICE GLAZE: But my answer to that -- why wouldn't we send this thing back, under the circumstances, since the U.S. Supreme Court has told us we are all wrong on the First Amendment and let you develop the Equal Protection argument?

MR. PRUETT: This is somewhat circular, but you do have the hypothesizing standard, and it really serves no useful purpose to remand this back to the trial court for the parties to brief the matter or obtain additional testimony. The stated purpose of the Act is to raise revenues. We do have in the record, uh, --

JUSTICE GLAZE: That is not enough. That's not enough.

* * *

JUSTICE BROWN: Doesn't that become perilously close to rationalizing after the fact? In other words, I assume your position is that what the state intended to do was embrace all cable television and slipped up in this regard. Did not include the scrambled satellite entities. And then realizing the mistake, brought them in?

MR. PRUETT: Well, there is --

JUSTICE BROWN: Did the state -- in your argument -- you didn't put before us a rational basis. Isn't the state really saying that under *Madden v. Kentucky* that maybe a rational basis isn't necessary in this case? -- in a case such as we have here?

MR. PRUETT: Well, I hadn't thought of it exactly in that regard. You know, for purposes of remand, we were directed to address the Equal Protection argument and then the hypothesizing standard, of course, comes in to allow us to flesh out perhaps the insufficient record.

* * *

JUSTICE BROWN: Isn't there something slightly wrong about conceiving this after the fact and maybe putting this together, building it up out of whole cloth or plucking it out of the air?

MR. PRUETT: It certainly is fanciful, I would agree. To some extent. However, the Court, under its "hypothesizing standard," which is good law and I realize that it's been issued in the past by special justices, but it's nonetheless the rule of law applicable to this case. We do not consider it to be suspect just because it was issued by special justices. And, of course, we would ask the Court to continue to adhere to that line of reasoning through the *Streight* and *Bosworth* and other subsequent cases.

* * *

To compound the errors committed by the Arkansas Supreme Court, on remand, that court also either ignored or disregarded the applicable "law of the case doctrine"[10] by reversing its prior holding (that was relied upon by all parties *and* this Court itself) that cable television and "scrambled" satellite

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[10] *B. & O. R. Co. v. United States*, 279 U.S. 718, 785–786 (1929) and *United States. v. United Smelting Co.*, 339 U.S. 186, 198–199 (1949). See also, 5 Am. Jur. 2nd, *Appeal and Error*, §§ 744–759.

services were essentially the same, or at least similarly situated, television programming services for constitutional classification comparison purposes. The Arkansas Supreme Court's finding, on remand (842 S.W. 2d at 431–32), that these two television services are *not* in the same classification for Equal Protection purposes, is clearly erroneous; it has absolutely no foundation in the evidentiary record [11], and, in any event, the lower court cannot reverse itself on this important issue because of the applicability of the controlling "law of the case doctrine" on that court's prior ruling on this precise point.

Therefore, the Petitioners submit that the challenged classification of taxpayers created by Act 188 of 1987, which was approved by the Arkansas Supreme Court, on remand, is capricious, palpably arbitrary, and illusory, as this Court found the classifications of taxpayers to be in *Zoebel v. Williams, supra* and *Stewart Dry Goods, supra*, and as the Illinois Appellate Court found these same classifications to be in the *Satellink of Chicago* case, where the facts were indistinguishable from those presented in this case. This Court has held in *Williams v. Vermont*, 472 U.S. at 27 that "the classification must reflect preexisting differences; it cannot create new ones that are supported by only their own bootstraps." The Petitioners respectfully submit that the Arkansas Supreme Court's classification of taxpayers, on remand in this case, is such a "bootstrap" classification; it is not a *real* distinction; it is a result of mere subjective speculation that has no relation to the evidentiary record established in the case; and that it does not

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[11] See the testimony of Paul Gardner, Jr., owner and operator of Community Communications Company (R. 737–738, 979E–979F), the testimony of Bob Blount, Executive Secretary of the ACTA (R. 672, 678–679), the testimony of Jim Guy Tucker, Chairman of the Board of Cablevision Management, Inc. (a cable operator) (R. 713, 720, 725–726) and the testimony of Gail Price, Manager, Sales & Use Tax Section, Revenue Division, Arkansas Department of Fiance & Administration (R. 753–754, 1010–1012). See also, Plaintiffs' Exhibits 8 and 9, the listing of television programming available on cable systems as published in the *Arkansas Democrat Gazette* and for "scrambled" satellite systems in *Orbit* magazine. (R. 838).

come within the lack of mathematical precision exception allowed legislatures by this Court in creating classifications of taxpayers.

Accordingly, the Petitioners respectfully request that this Court grant their Petition for Writ of Certiorari, and rule, as the other cited federal and state courts have done in challenges to similar taxes of general applicability that are discriminatorily applied to these "new" communication services that have been created by the electronic segment of the mass communications media, i.e., the arbitrary classification of taxpayers created by Act 188 of 1987, under a proper application of the "rational basis" test for Equal Protection purposes, must lead to the inescapable decision that Act 188 of 1987 does not pass constitutional muster, until its amendment by Act 769 of 1989.

II.

THE SALES TAXES IMPOSED BY ACT 188 OF 1987 UPON THE SALE OF CABLE TELEVISION SERVICES, BUT NOT UPON THE SALE OF SIMILARLY SITUATED "SCRAMBLED" SATELLITE TELEVISION BROADCAST SERVICES, VIOLATES CONGRESS' PREEMPTIVE PROHIBITION AGAINST THE IMPOSITION OF UNDULY DISCRIMINATORY GENERAL TAXES AGAINST CABLE TELEVISION SERVICES

In the fall of 1984, after several years of intense wrangling between the cable television industry and the state and local governments, Congress enacted the Cable Communication Policy Act of 1984 for the purpose of setting a "national policy" concerning matters that might affect cable communications. It is unquestioned that the Congress has the ultimate power to regulate commerce among the states and that Congress' adoption of the 1984 Cable Act preempted the power of state and local governments to regulate the cable television industry, especially regarding the power to set subscription rates. However, it is also obvious, from a review of the legislative history of the 1984 Cable

Act, that Congress was then also well aware of the fact that state and local communities were looking upon the cable television industry as a "substantial" source of "new" tax revenues. Therefore, Congress took the opportunity in the 1984 Cable Act to declare a "policy" that state and local taxes of general applicability could not be imposed in an *unduly discriminatory* manner upon cable television operators and subscribers. See, 47 U.S.C. § 542(g)(2)(A). App. F, *infra*, 32a. The Committee Reports to the Cable Communications Policy Act of 1984 clearly establish that this "double negative" restriction contained in 47 U.S.C. § 542(g)(2)(A) was intended to be a statement of "congressional policy" requiring a nondiscriminatory imposition of general taxes by state and local governments across the nation. See, House Report No. 98–938 to H.R. 4103, where it is specifically stated that (pg. 63–64) --

> Similarly, any tax of general applicability is not a franchise fee, and not subject to the 5 percent limitation. This would include such payments as a general Sales Tax, and entertainment tax imposed on other entertainment businesses as well as the cable operator, and utility taxes or utility user taxes which, while they may differentiate the rates charged different types of utilities, do not unduly discriminate against the cable operator so as to effectively constitute a tax directed at the cable system.

Clearly, Act 188 of 1987 was enacted after the effective date of the Congressional prohibition contained in 47 U.S.C. § 542(g)(2)(A) and Act 188 of 1987 imposed Arkansas' Sales Taxes solely upon cable television services, but *not* upon the sale of the same television programming sold by means of "scrambled" satellite television subscription services. It was not until the adoption of Act 769 of 1989 that this unduly discriminatory imposition of Arkansas' Sales Taxes on cable operators and subscribers was eliminated. Thus, during this two year period of time between 1987 and 1989, Act 188 of 1987 created a statutory scheme where Arkansas' otherwise generally applicable Sales Taxes were imposed in an "unduly discriminatory" manner against the cable operator and subscriber, in violation of the preemptive

prohibition against such state legislative action that Congress placed into the 1984 Cable Act.

Under the express terms of the Supremacy Clause of the United States Constitution, Article 6, Clause 2, *supra*; when Congress adopts a statute on any matter, then the federal legislation "preempts" any contrary state statutory provision. The federal law controls and every judge of every state court will be bound by such congressional determination. In fact, in a prior Supremacy Clause based challenge involving the cable television industry, this Court has ruled that an administratively adopted federal regulation of the FCC will "preempt" even a state's conflicting constitutional provision on the same subject. See, *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691 (1984). This Court noted in *Capital Cities Cable*, that Congressional action on a subject will preempt and control over a conflicting state law, in at least two instances that are applicable to the factual circumstances presented in this case. First, when Congress enacts a federal statute that expresses a clear intent to preempt a state law, and, second, when it is clear, despite the absences of explicit preemptive language, that Congress intended by legislating comprehensively, to occupy an entire field of regulation and thereby left no room for the states to supplement the federal law.

The provisions of 47 U.S.C. § 542(g)(2)(A), and the legislative history of this statutory provision, makes it absolutely clear that Congress was aware of the problems that were being created when state and local governments imposed otherwise generally applicable taxes in a "discriminatory" fashion on cable operators and cable subscribers. Therefore, Congress by enacting the 1984 Cable Act, created a "national policy" which did not bar the imposition of otherwise generally applicable taxes upon cable television services, but, if such taxes of general applicability (including Sales Taxes) were to be applied by the state or local governments, these taxes could *not* be applied in an "unduly discriminatory" manner against the cable operator or subscriber.

The Petitioners' submit that Act 188 of 1987's extension of Arkansas' otherwise generally applicable Sales Taxes to charges for

cable television services on July 1, 1987, created a situation where such Sales Taxes were "unduly discriminatory" against cable operators and subscribers, until July 1, 1989, when Act 188 of 1987 was effectively amended by Act 769 of 1989, so as to extend these same general Arkansas Sales Taxes to charges made for "scrambled" satellite television programming services, as well as to charges made for cable television services.

The Petitioners submit that the Arkansas Supreme Court, in considering their preemptive Supremacy Clause argument, on remand in this case, misapplied the standards announced by this Court in its *Capital Cities Cable* case, *supra*. Therefore, the Petitioners pray that this Court will grant their Petition for Certiorari and render a decision on this important alternative basis asserted by the cable operators and subscribers for seeking refunds of the state and local Sales Taxes that were improperly and illegally imposed upon them for the two year period from July 1, 1987 through June 30, 1989.

CONCLUSION

For the particular reasons stated above, the Petitioners' submit that this Petition for Certiorari to the Arkansas Supreme Court should be granted, so as to provide this Court for a vehicle to answer the important Equal Protection and Supremacy Clause questions that have been presented by the Petitioners.

Respectfully submitted,

APRIL 12, 1993

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APPENDIX A

SUPREME COURT OF ARKANSAS

No. 89-89

Opinion delivered November 23, 1992

DANIEL L. MEDLOCK, et. al.

Appellants

Appeal from Pulaski County Chancery Court, No. 87-2401

v.

TIMOTHY J. LEATHERS, Commissioner of Revenues, et. al.

Honorable Lee A. Munson, Judge

Appellees

Affirmed

CITY OF FAYETTEVILLE, ARKANSAS,

Intervenor

KENNETH R. MOURTON, Special Justice

This case involves the issue whether Arkansas' imposition of a gross receipts tax violates the Equal Protection Clause of the Fourteenth Amendment. We hold that no such violation occurred even though the tax applied to cable television operators and subscribers while remaining silent as to satellite subscribers and operators. The chancellor's order denying and dismissing the equal protection claim is affirmed. A finding of the statute's constitutional validity allows us to dismiss the Supremacy Clause issue.

On March 21, 1987, the Arkansas General Assembly adopted Act 188 of 1987 [Act 188], effective July 1, 1987, amending the previous statute concerning the Arkansas gross receipts tax. Act 188 added cable television to the list of services that had state and local sales taxes imposed on them. It did not, however, apply to other forms of mass media, particularly scrambled satellite television services. The appellants filed a class action on May 28, 1987, requesting that Act 188 be declared an illegal exaction discriminating among mass media.

Appellants are Daniel L. Medlock, a cable subscriber, Community Communications Company, the Arkansas Cable Television Association, Inc. on behalf of themselves and all other similarly situated taxpayers subjected to the television services sales tax. The appellees are James C. Pledger, the Commissioner of Revenues, Timothy J. Leathers and various state, county, and city officials, Pulaski County, the City of Benton, and all similarly situated counties and cities. The City of Fayetteville intervened. Appellants claimed a variety of their constitutional rights had been violated: freedom of speech; freedom of the press; equal privileges and immunities; freedom of equal protection of the laws and protection under the Supremacy Clause. These allegations centered primarily on the claim of discrimination against cable television under the First Amendment. This court originally held that the First Amendment required similar taxation of cable and satellite providers. The U.S. Supreme Court found that imposing the fee upon cable alone did not impede cable's free speech ability to act as a check on government nor did it target a small group of speakers or discriminate on content and was therefore constitutionally permissible. *Leathers v. Medlock*, ___ U.S. ___, 111 S.Ct. 1438 (1991). We originally found that cable and satellite businesses were similarly situated because they ended in substantially the same result -- video programming. *Medlock v. Pledger*, 301 Ark. 483, 785 S.W.2d 202 (1990), *aff'd in part, rev'd in part, Leathers v. Medlock*, ___ U.S. ___, 111 S.Ct. 1438 (1991). The case has been remanded to us for consideration of the issue that we did not originally reach: whether the Equal Protection Clause required similar taxation of cable and satellite

providers. We allowed the parties to address the Supremacy Clause issue during the remand.

The chancery court [1] found in favor of appellants and determined Act 188 was not an illegal exaction. After the chancellor's decision,[2] Act 188 was amended by Act 769 of 1989, effective July 1, 1989, to include "[s]ervice of cable television, community antenna television, and any and all other distribution of television, video, or radio services . . . " Ark. Code Ann. § 26-52-301(3)(D)(i) (Repl. 1992).

I.

The Fourteenth Amendment of the U.S. Constitution provides, "No state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1. In previous equal protection cases this court has determined that tax legislation often survives the rational basis test. *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). The court stated, "[u]nder the rationality standard of review, we must presume the legislation is constitution, i.e. that it is rationally related to achieving a legitimate governmental objective." *Id.* at 213, 655 S.W.2d at 463. Awareness of local needs and usages of funds helps the legislature form equitable distributions of tax burdens. Such knowledge and familiarity with community conditions have traditionally allowed courts to tolerate legislatively created classifications. *See generally Regan v. Taxation with Representation of Washington*, 461 U.S. 540 (1983) (stating that legislatures have extremely broad latitude in creating classifications and distinctions in tax statutes); *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938) (holding that state

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[1] The Honorable Lee A. Munson, Chancellor, First Division, Pulaski County Chancery Court presided.

[2] Chancellor Munson entered an Opinion on March 10, 1989, and an Order and Judgment on March 31, 1989.

legislatures may identify or designate a particular class to be the object of a tax so long as the state does not violate the class' rights to equal protection of the laws); *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32 (1928) (explaining that flexibility is granted to states to classify for taxation purposes); *Citizens' Tel. Co. v. Fuller*, 229 U.S. 322, *aff'd*, 229 U.S. 335 (1913) (reviewing numerous decisions where state legislatures were allowed to discriminate among different persons in taxation statutes).

"Inherent in the power to tax is the power to discriminate in taxation." *Leathers*, ___ U.S. at ___, 111 S.Ct. at 1446. Courts should defer to local legislative determinations as to the desirability of imposing discriminatory measures. *City of New Orleans v. Dukes*, 427 U.S. 297 (1976). A court will not strike down a classification merely because it is under-inclusive. The law must be "purely arbitrary" in its classification; thus the only classification now allowed in taxing is invidious discrimination. Id. If a taxation statute discriminates in favor of one class it is not determined to be arbitrary so long as the discrimination is based upon a reasonable distinction, and if there is any hypothesized set of facts to uphold a rational basis. *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). Appellants argue that hypothesizing a rational basis, as in *Streight*, should be beyond the power of this court. We view hypothesizing a rational basis the same as conceiving a rational basis; a practice that is available to the courts without question. We point to the language of *Streight* and conclude that any rational basis for a taxation statute may be developed at any time.

> In any event, the judiciary is allowed to hypothesize and ... reach a conceivable basis for the exemptions which [it] conclude[s] are rational, reasonably distinctive and not arbitrary. It causes us to defer to legislative purpose because there is a rational basis for the tax . . . .
>
> Before it is said that such hypothesizing is far afield, we re-emphasize that our role is not to discovery the *actual basis* for the legislation. Our

> task is merely to consider if *any* rational basis exists which demonstrates the possibility of a deliberate nexus with state objectives so that the legislation is not the product of utterly arbitrary and capricious government and void of any hint of deliberate and lawful purpose.

Streight, 280 Ark. at 214–15, 655 S.W.2d at 464.

This court will give great deference to the General Assembly in the legislation of taxation where the clear intent of the statute is to raise revenue and not to discriminate among similarly situated individuals. In a similar equal protection case involving the media, Justice Rehnquist stated, "[w]e have shown the greatest deference to state legislatures in devising their taxing schemes." Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575, 599 (1983) (Rehnquist, J., dissenting). Even without such deference Act 188 will survive the rational basis test when we apply the intervenor's argument. Arkansas, primarily a rural state, may classify between satellite and cable because the state needs satellite television transmission in those geographic areas where cable services are not feasible. We acknowledge other conceivable rational bases for the arguments that were addressed at oral argument but we are not compelled to discuss them here. One conceivable rational basis is enough to pass the test.

In searching for any rational basis, we ask whether the created classification has a conceivable reasonable relationship to the governmental action. *Madden v. Kentucky*, 309 U.S. 83 (1940). Under the rational basis test, a reasonable purpose of the legislation need not be determined at the time of passage of the statute. Because broad discretion to classify has long been recognized in taxation, *New York Rapid Transit Corp. v. City of New York*, 303 U.S. 573 (1938), "the Fourteenth Amendment was not intended to compel the State[s] to adopt an iron rule of equal taxation." *Bell's Gap R.R. Co. v. Pennsylvania*, 134 U.S. 232, 239 (1890).

Because of this presumption of a tax's constitutionality, the party challenging the tax has the burden of showing that no conceivable basis could ever support it. *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61 (1911); *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983). We originally determined cable and satellite to be "the purveyors of a particular medium." *Medlock v. Pledger*, 301 Ark. 483, 487, 785 S.W.2d 202, 204 (1990). That "particular medium," video programming, is the end result of both cable and satellite. Because of the characteristics of television programming the process can be divided into several classes based on transmission techniques. Cable, both basic and premium, depends upon a sophisticated transmission system requiring substantial investments by cable companies. Satellite, however, merely requires installing a satellite dish by the user, as does an antenna user installing an antenna. The sophisticated transmission system is not needed. De-scrambled satellite is only different from satellite in that it requires special programming at the programming location which is usually out of state. Even though the end result of the video programming is similar, satellite and cable providers transmit their signals to viewers in different ways; therefore, a distinguishable classification at the initial stage of programming exists.

II.

Counsel for appellants, in their briefs and at oral argument, displayed a misconception of the purpose and strength of Special Justices. Although we trust this misconception is not widespread, we are compelled to address it in hopes of avoiding confusion in the future. Special Justices are an intricate and necessary part of our judicial system and shall continue to enjoy the distinguished positions they have traditionally possessed throughout our history. To say that any law created by Special Justices is some type of "special law" which does not need the public's compliance is a fallacy.

This court has numerous opinions authored by Special Justices. Due to the doctrine of *stare decisis* these cases have been

upheld and applied to similar fact patterns. *Bosworth v. Pledger*, 305 Ark. 598, 810 S.W.2d 918, *cert. denied*, 112 S.Ct. 617 (1991) involved four Special Justices while the Court in *Streight*, 280 Ark. 206, 655 S.W.2d 459, was comprised entirely of Special Justices. In *Streight* the issue involved retirement income tax exemptions of government employees. The Justices all recused themselves because the outcome of that case affected their financial interests. Had the safety valve of Special Justices not been present, the case may well have never been litigated. *Bosworth* involved equal protection arguments on a state sales tax on telephone communication services. The decision, although written by a Special Justice, was a unanimous decision of the court. Both cases have been cited by this court and upheld even in situations where no Special Justices served.

When justices of this court find it necessary to disqualify themselves from participating in a case it is imperative that there be some safety valve that will allow the parties to continue before the court; Special Justices serve this purpose. To argue that the Special Justices are not true justices is absurd and only serves to create a myth that laws can be distinguished on varying levels of importance. For these reasons we conclude that any opinion of this court involving one or more Special Justices shall bear the same precedential value as any other.

III.

This court does not intend to favor or advocate particular lawyering tactics. We are obliged, however, to note that when counselors file briefs and appear before the court certain expectations exist. A party's argument is judged through the combination of briefs and oral arguments. There is a fundamental unfairness in not adequately and fully presenting one's position in the brief and waiting until oral argument to clarify it. Litigants are entitled to know all arguments so that they may prepare adequate responses. Requiring presentation of arguments in briefs enhances quicker resolution and more complete discussion of the issues.

Because both parties conceded the appropriate standard of review, the essential remaining issue in this case was whether the facts fit within the rational basis test. Appellees, therefore, should have submitted a more concise brief presenting conceivable bases for the statute. It is not the job of the court, but rather of attorneys to present arguments to bolster their positions. Counsel representing appellees did not advance any possible rational bases and initially replied ambiguously when questioned by the bench at oral argument. Upon further questioning, however, he provided his examples of rational bases for Act 188's different treatment of cable and satellite. He also stated that it was a "hearing tactic" to not disclose the purpose or basis in the brief but to disclose at oral argument. We are concerned with such techniques because we often make determinations based on the disclosure in briefs and argument. These actions do not afford the opposing party any fair opportunity to respond.

Ark. Sup. Ct. R. 18(j) provides that "[i]f a case outside the brief is to be cited, the citation must be furnished opposing counsel in advance as soon as possible." This requirement and the other guidelines of Rule 18 are for the purpose of having arguments where all parties are fully prepared. Because we will not permit counsel, absent necessity or special permission, to read from books, counsel should make all responsible efforts to disclose their basic positions prior to arguments. Although the outcome of this case was not substantially affected by the actions of counsel, we find it appropriate that counsel should fully disclose and develop their respective positions in the briefs. [3]

IV.

Appellants argue that Act 188 conflicts with and is preempted by the Federal Cable Communications Policy Act of 1984 [Cable Act], codified as 47 U.S.C. § § 521 to 559, 611 (1988 & Supp. 1990). We find this issue is without merit. Appellants

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[3] Counselors will continue to have flexibility to elaborate arguments, explain positions, or answer questions even after following this procedure.

argue that Act 188, by taxing cable without taxing satellite unduly discriminated against cable and thus violated the federal cable act. Appellants also state that Congress was trying to create a national policy that would deal with the problems that arise when state and local governments discriminatorily impose general taxes. There is, however, no actual conflict between the Cable Act and Act 188. When Congress defined "franchise fee" in the Cable Act, it recognized that general taxes could be imposed on cable. 47 U.S.C. § 542(g)(2)(A) (1988). Because we have determined that Act 188 was not duly discriminatory, the Supremacy Clause issue is without merit.

Article VI, Clause 2 provides, "This Constitution, and the laws of the United States which shall be made in pursuance thereof; ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the ... laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl.2. As Section 542(g)(2)(A) provides, "the term 'franchise fee' does not include ... any tax ... of general applicability" and may be imposed on cable services so long as it is not "unduly discriminatory."

In the 1941 case of *Hines v. Davidowitz*, the U.S. Supreme Court warned about preemption cases; "[b]ut none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). In *Goldstein v. California*, 412 U.S. 546 (1973) the Court, in deciding whether a state law would be preempted, asked whether the state law stood as an obstacle to the accomplishment of Congress' objectives or purposes. This test was expanded in *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984), where the Court based preemption on four factors: whether Congress expressed a clear intent to preempt state law; whether Congress occupies the field so as to leave no room for the states to supplement; whether compliance with both the state and federal laws is impossible; and whether the state law stands as an obstacle to Congress' objective or purpose. *Id.*

When Congress passed the Cable Act, it intended to create a national policy governing cable communications while at the same time providing guidelines for state and local authority to regulate cable systems. 47 U.S.C. § 521(1), (3) (1988). Once Congress left the door open for state and local governments to regulate, it did not intend to preempt any legitimate state legislation; nor did it totally occupy the field of cable communications. It is possible to comply with both state and federal laws, likewise, the state statute does not stand as an obstacle to Congress' purpose. Act 188 fits within the area of discretion left by the Cable Act to allow state and local communities to regulate and tax cable services as they choose. We therefore dismiss the preemption issue.

Affirmed.

Dudley, J. not participating.

APPENDIX B

SUPREME COURT OF ARKANSAS

No. 89-89

Opinion delivered: Feb. 28, 1990

DANIEL L. MEDLOCK, et al.

Appellants

v.

JAMES C. PLEDGER, et al.

Appellees

Appeal from Pulaski County Chancery Court (87-2401)

Honorable Lee A. Munson, Chancellor

Reversed and Remanded

DAVID NEWBERN, Associate Justice

The question in this case is whether the imposition of a sales tax on cable television service is an unconstitutional, and thus illegal, exaction because the tax does not apply to other mass communications media. We hold that, for a time, the tax was illegal because it was not levied on other, similar services, such as satellite television programming. Now that the tax has been made to apply to all similarly situated businesses, however, its illegality has been cured. We remand the case to the chancellor so that the taxes illegally collected may be refunded to those who paid them.

By Act 188 of 1987 the general assembly added to the services to be subject to the sales tax:

> Cable television services provided to subscribers or users. This shall include all service charges and

> rental charges whether for basic service or premium channels or other special service, and shall include installation and repair service charges and any other charges having any connection with the providing of cable television services.

By Act 769 of 1989, the language was changed to the following:

> Service of cable television, community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services.

Act 769 was signed by the governor on March 21, 1989, and in accordance with its emergency clause, became law on July 1, 1989. The act is now codified as Ark. Code Ann. § 26-52-301(3)(D)(i) (Supp. 1989).

Act 188 was promptly challenged by the appellants, Daniel L. Medlock, Community Communications Co., and the Arkansas Cable Television Association, Inc., on behalf of themselves and all other similarly situated taxpayers. The appellees are James C. Pledger, Commissioner of Revenues, and various state, county, and city officials, Pulaski County, the City of Benton, and all other similarly situated counties and cities. The City of Fayetteville intervened.

As Act 769 had not become law when the chancellor made his ruling, the sole question before him was the constitutionality of Act 188. The taxpayers challenged it as being in violation of their rights of freedom of speech and

freedom of the press guaranteed by the First Amendment, their right to equal privileges and immunities guaranteed by U.S. Const., art. 4, § 2, and Ark. Const. art. 2, § 18, and their right to equal protection of the laws guaranteed by the Fourteenth Amendment and Ark. Const. art. 2, § 3. They also claimed protection under 47 U.S.C. § 542 and the Supremacy Clause. All of the counts in the complaint boiled down to a claim of discrimination against the cable television medium, and that is the essence of the arguments on appeal, although they are segmented as was the complaint.

1. Public rights of way

In his order ruling against the taxpayers, the chancellor distinguished the cable medium from others on the ground that it required use of a public right of way in addition to the fact that there are no gross proceeds to be taxed in the case of, for example, broadcast television. There was uncontradicted testimony to the effect that a cable television enterprise pays a franchise fee for the use of the right of way. It is true that the use of public-rights of way by cable television may subject it to more regulation as has been suggested in some cases. *See City of Los Angeles v. Preferred Communications, Inc.*, ____ U.S. ____, 106 S.Ct. 2034, 90 L.Ed. 480 (1986); *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 714 (8th Cir. 1986); *Omega Satellite Products v. City of Indianapolis*, 694 F.2d 119 (7th Cir. 1982); *Community Communications v. City of Boulder*, 660 F.2d 1370 (10th Cir. 1981). However, those cases involve regulation related to access to or use of the rights of way rather than a tax which has no relationship to the acquisition of the privilege of using public property. We thus find the fact that cable television uses public property and must obtain a franchise to do so should not control the result in this case.

2. The First Amendment

We need not indulge in a long explanation of the history of cable television and the cases which have gradually recognized the entitlement of such enterprises to First Amendment protection. A good discussion of it is found in *Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434 (D.C. Cir. 1985).

The Supreme Court has left no doubt about the matter. In *City of Los Angeles v. Preferred Communications, Inc., supra*, it was held that the complaint of a cable television company alleging violation of the company's rights guaranteed by the First Amendment should not have been dismissed for failure to state a claim upon which relief could be granted. The court made it clear that the complaint implicated the First Amendment and facts should be developed to determine how to balance the First Amendment protection to which a cable television company was entitled against the city's right to regulate the company's use of public property.

3. Discrimination.

Entitlement to protection under the First Amendment does not mean entitlement to absolute freedom from regulation by the government. *U.S. v. O'Brien*, 391 U.S. 367 (1968). If a tax is to be applied to an enterprise entitled to First Amendment protection, it must be a general tax and must not be a form of censorship. In *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), Louisiana was held to have violated the First Amendment by imposing a tax on newspapers circulating more than 20,000. The court recognized that the press may be subjected to taxation but not if the tax is discriminatory and functions as a censor of some newspapers but not others.

In *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), it was held that a

Minnesota use tax on ink and paper purchases over $100,000 was invalid because its impact was on a few newspapers and one in particular. Unlike the *Grosjean* case, there was no direct implication of censorship, but the tax was found to discriminate among newspapers and thus to be invalid. The Supreme Court again recognized, however, that the press is subject to a general, nondiscriminatory tax.

In *Arkansas Writers' Project v. Ragland*, ___ U.S. ___, 107 S.Ct. 1722, 95 L.Ed. 209 (1987), the Supreme Court held that a tax which was applied to some, but not other, magazines sold in Arkansas was in violation of the First Amendment.

In none of the cases we have discussed above, and in none of the other cases cited to us, do we find the Supreme Court holding that, for example, the failure to tax newspapers in the same manner as radio broadcasts violates the First Amendment. Each of the cases involved discrimination among competing mass communicators, each of whom was entitled to First Amendment protection. The taxpayers argue here that cable television is entitled to exemption from the sales tax because newspaper sales are not taxed and subscription magazine sales are not taxed. They would like us to issue a ruling which would invalidate not only Act 188 but, in effect, Act 769 as well. We decline to do so. As noted above, Act 769 was not before the court in this case, and we are unwilling to hold that all mass communications media must be taxed in the same way. It would be impossible to impose a tax which would have the same effect on broadcast television, the delivery of which produces no direct "gross proceeds," and cable television. We must, however, hold that a tax which discriminates between mass communicators delivering substantially the same service runs afoul of the First Amendment and the cases which prohibit discriminatory taxation among the purveyors of a particular medium.

Act 188 levied a tax on cable television enterprises but did not tax the proceeds resulting from the "unscrambling" of satellite signals. The similarity of the services is demonstrated in the testimony of Paul Gardner, Jr., president of the Arkansas Cable Television Association. He testified that his company offered both cable service and decoders for "unscrambling" satellite television broadcasts which a viewer using a satellite dish could not otherwise receive. He testified that his company charged the same to a cable viewer for the premium HBO channel, for example, as it charged a satellite viewer. Act 188 thus imposed a tax which cannot pass First Amendment muster, and we must remand this case to the chancellor for orders consistent with this opinion.

Reversed and remanded.

Dudley, J., not participating.

APPENDIX C

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers — PLAINTIFFS

vs. — No. 87-2401

JAMES C. PLEDGER, COMMISSIONER OF REVENUES; JIMMIE LOU FISHER, TREASURER OF THE STATE OF ARKANSAS; DONALD VENHAUS, COUNTY JUDGE, PULASKI COUNTY, ARKANSAS; PATRICIA TEDFORD, TREASURER, PULASKI COUNTY, ARKANSAS; PULASKI COUNTY, ARKANSAS; JOANN BOONE, TREASURER, CITY OF BENTON, ARKANSAS; THE CITY OF BENTON, ARKANSAS; and all other similarly situated counties and cities — DEFENDANTS

CITY OF FAYETTEVILLE, ARKANSAS — INTERVENOR

ORDER AND JUDGMENT

Based upon the Opinion containing this Court's findings of fact and conclusions of law entered in this cause on March 10, 1989, wherein this Court determined that Act 188 of 1987 [Ark. Code Ann. §26-52-301(3)(D)] is constitutionally valid, both facially and in its application, as

against the First Amendment and Equal Protection challenges of plaintiffs; and

Based upon the further findings by this Court that said law is a valid exercise of the State's police power and does not violate Article 2 Section 18 of the Arkansas Constitution or any provision of the Cable Communications Policy Act of 1984;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that plaintiffs' complaint be dismissed; that the Preliminary Injunction entered in this case on August 28, 1987 be and is hereby dissolved; that all funds previously required herein to be deposited into an interest-bearing escrow account now be released; and that all escrow requirements and other restrictions previously imposed herein against defendants be and are hereby dissolved and removed.

ENTERED this 13 day of March, 1989.

/s/ Lee A. Munson
Lee A. Munson
Chancellor

APPENDIX D

IN THE CHANCERY COURT
OF PULASKI COUNTY, ARKANSAS
FIRST DIVISION

DANIEL L. MEDLOCK, COMMUNITY COMMUNICATIONS COMPANY AND THE ARKANSAS CABLE TELEVISION ASSOCIATION, INC., on behalf of themselves and all other similarly situated taxpayers — PLAINTIFFS

vs. — No. 87-2401

JAMES C. PLEDGER, Commissioner of Revenues; JIMMIE LOU FISHER, Treasurer of the State of Arkansas; DONALD VENHAUS, County Judge, Pulaski County, Arkansas; PATRICIA TEDFORD, Treasurer, Pulaski County, Arkansas; PULASKI COUNTY, ARKANSAS; JOANN BOONE, Treasurer, City of Benton, Arkansas; THE CITY OF BENTON, ARKANSAS; and all other similarly situated counties and cities — DEFENDANTS

CITY OF FAYETTEVILLE, ARKANSAS — INTERVENOR

OPINION

From the evidence introduced at the hearing on plaintiff's motion for preliminary injunction, the evidence introduced at trial, as well as the arguments and authorities cited by the parties in their briefs, the Court makes the following Findings of Fact and Conclusions of Law pursuant to Rule 52 (a) of the Arkansas Rules of Civil Procedure:

FINDINGS OF FACT

1. Plaintiffs in this action are Daniel L. Medlock, a citizen of Pulaski County, Arkansas, and a subscriber to cable television services. Community Communications Company, is an Arkansas corporation which operates 6 separate cable television systems in south Arkansas at Monticello, Warren, Arkansas City, Eudora, Tillar/Reed and East Camden. The Arkansas Cable Television Association, Inc. is a trade organization composed of 80 of the approximate 100 cable television system operators in the State of Arkansas.

2. The defendants are James C. Pledger, the Commissioner of Revenues and the person charged with collecting the state and local sales taxes in question each month from the individual cable operators. Jimmie Lou Fisher is the Treasurer of the State of Arkansas and is the person charged with receiving all collected state and local sales tax monies from the Commissioner of Revenues and then distributing such state sales taxes to the respective agencies under the Revenue Distribution Act and all local sales taxes to the respective counties and cities in the State of Arkansas wherein a local sales tax has been imposed. Donald Venhaus and Particia Tedford are, respectively, County Judge and Treasurer of Pulaski County, Arkansas. Pulaski County, Arkansas is one of approximately forty-two counties wherein a county wide local sales tax was imposed as of the time of trial. Joann Boone is the Treasurer of the City of Benton, Arkansas, and the City of Benton, Arkansas is one of approximately eighty municipalities within the State of Arkansas wherein a local municipal sales tax is imposed.

3. Testimony at trial established that there are approximately one hundred cable system operators providing cable television services in the State of Arkansas to approximately four hundred thousand separate

subscriber-customers. These systems vary in size from only a few one hundred subscriber-customers up to one system in Pulaski County, Arkansas with sixty-five thousand subscriber-customers.

4. These cable television system operators provide cable television service to their subscriber-customers in return for a monthly subscription fee. There are generally several levels of service provided, with additional charges being made by the operators for greater levels of service or what are generally referred to as "premium channels" or "pay channels."

5. The evidence at trial established that there are more programming services available to cable operators than can be carried on most cable systems in Arkansas. Witnesses who operated cable television systems in the State of Arkansas testified that they were constantly reviewing the choice of programming to be offered to their customer-subscribers. Specifically, Mr. Gardener, the owner and operator of Community Communications Company testified that in his six cable systems there was no exact uniformity of the programming offered. Instead, though each of his six cable systems offered some of the same programming, he chose to make some programming different in each system because of the particular interests of the individual subscribers in each of the systems.

6. Evidence introduced by plaintiffs' witnesses at the various hearings in this case has established that cable television system operators in the State of Arkansas make a variety of programming available to their subscriber-customers. Some of the programming is a retransmission of original works by others, while some of the programming is actually originated by the cable television system operator or is a cable casting of programming produced specifically for cable television system distribution in Arkansas.

7. The "cable casting" by cable television system operators provides Arkansans with a variety of programming which presents a mixture of news, information and entertainment. This programming seeks to provide a wide variety of topics and formats, including regular news and entertainment programming, public access channels, public announcements and electronic bulletin board.

8. The plaintiffs introduced a two-minute video tape of examples of programming produced exclusively for cable television distribution in the State of Arkansas. Such programming including agricultural service reports, policy commentary on the State Legislature's activities, industrial incentive programming and educational training, in addition to a variety of entertainment programming offered by cable television operators.

9. The owner-operators of two cable systems as well as the Executive Director of the Arkansas Cable Television Association, Inc. testified that they considered cable television programming to be the equivalent of "an electronic magazine".

10. The operator of one small system testified that his system even provided an electronic billboard service where his system's customer-subscribers could send messages (for example birthday greetings) to other customers of the same system. The operator of Community Communications Company testified that his cable systems generated some original programming. The company system at Warren, Arkansas cable cast the City Council and school board meetings, the local high school football games, and coverage of the Warren Pink Tomato Festival.

11. Since 1941, Arkansas has imposed a general sales tax upon the gross proceeds derived from the sale of all tangible personal property and from the sale of certain services. Ark. Code Ann. §26-52-101, et seq. Since late 1981,

Arkansas' counties and cities have been able to enact local option sales taxes that apply to the sales of the same goods and services as does the state sales tax. These local taxes may be imposed upon a county wide basis or only within the borders of one municipality. These local sales taxes are collected and administered by the Commissioner of Revenues in the same manner as he administers the State sales taxes. As of the time of trial, approximately forty-two counties and over eighty municipalities in Arkansas imposed these local sales taxes upon the sale of the same goods and services that are taxed by the State sales tax laws.

12. Mahlon Martin, the Director of the Arkansas Department of Finance and Administration, testified that the State of Arkansas had never prior to July 1, 1987 attempted to subject the charges made by cable operators to State and local sales taxes.

13. Act 188 of 1987 was signed into law by Governor Clinton on March 12, 1987, to be effective on July 1, 1987. Act 188 of 1987 [Ark. Code Ann. §26-52-301 (3) (D)] provides as follows:

> There is levied an excise tax of three percent (3%)
> upon the gross proceeds or gross receipts derived from all sales to any person of the following:
>
> (D) Service of cable television provided to subscribers or users including all service charges and rental charges, whether for basic service of premium channels or other special service, and including installation and repair service charges and any other charges having any connection with the providing of cable television services.

14. The Manager of the Sales & Use Tax Section of the Revenue Division testified that July 1, 1987 was the first time that the State of Arkansas had ever attempted to

impose the State and local sales taxes upon charges for cable television services.

15. On the passage of Act 188 of 1987, the Revenue Division of the Arkansas Department of Finance and Administration notified all cable television system operators in the State of Arkansas that they would have to register with the Sales & Use Tax Section, secure Sales Tax Permit Numbers, and begin to collect and remit the applicable state and local sales taxes imposed in their respective communities on cable television services provided on or after July 1, 1987. One cable television system operator testified that his company acted as a collecting agent for scrambled satellite television broadcast system charges in his area. The owner of Community Communications Company testified that his company also acted as collecting agent for scrambled satellite broadcast services in his area and that he invoiced his customer-subscribers for both cable television system services and scrambled satellite television broadcast services approximately the same amount each month. This operator testified that he applied the state and local sales taxes only to the charges made to the delivery of services by his cable system, while not applying the tax to the charges made by his company for delivery of television services by scrambled satellite television broadcast directly to the subscriber-customer's own "earth station".

16. Cable television enjoys universal access to the homes of subscriber-customers and requires use of public ways for provision, maintenance and repairing of its property and services. *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Circuit 1986).

CONCLUSIONS OF LAW

1. The Court has subject matter jurisdiction over this controversy pursuant to the provisions of Article 16, Section 13 of the Arkansas State Constitution. The Court

also has personal jurisdiction over each of the parties to this case.

2. Cable television operations are covered by the First Amendment to the Constitution of the United States. The First Amendment privileges apply to both the cable television system operators and to the cable television system subscriber's right to receive cable programming.

3. Though the United States Supreme Court has not specifically ruled upon the extent of First Amendment Protective Rights afforded to cable television, the Court in the case of *City of Los Angeles v. Preferred Communications, Inc.*, 474 U.S. ____, 106 S.Ct. 2034 (1986), recognized that cablecasting is to be afforded First Amendment protected rights. There, in a case involving the cable operators attack upon the City of Los Angeles' refusal to grant it a non-exclusive franchise to operate, the Supreme Court held:

> We do think that the activities in which respondent allegedly seeks to engage plainly implicate First Amendment interests. Respondent alleges:
>
> > The business of cable television, like that of newspapers and magazines, is to provide its subscribers with a mixture of news, information and entertainment. As do newspapers, cable television companies use a portion of their available space to reprint (or retransmit) the communication of others, while at the same time providing some original content. App. 3A
>
> Thus, through original programming or by exercising editorial discretion over which stations or programs to include in its repertoire, respondent seeks to communicate messages on a wide variety of topics and in a wide variety of formats. We recently

noted that cable operators exercise a "significant amount of editorial discretion regarding what their programming will include." *FCC v. Midwest Video Corp.*, 440 U.S. 698, 707, 99 S.Ct. 1435, 1445 (1979). Cable television partakes of some of the aspects of speech and the communication of ideas as to the traditional enterprises of newspapers and book publishers, public speakers, and pamphleteers. Respondent's proposed activities would seem to implicate First Amendment interests as do the activities of wireless broadcasters, which were found to fall within the ambit of the First Amendment in *Red Lion Broadcasting Co. v. FCC, supra*, 395 U.S., at 386, 89 S.Ct. 1804, even though free speech aspects of the wireless broadcasters' claim were found to be outweighed by the government interest in regulating by reason of the scarcity of frequencies.

4. This Court must determine the extent of First Amendment Protected Rights of cable television. The First Amendment provides that "Congress shall make no laws . . . abridging the freedom of speech . . . or the press". The United States Supreme Court, in the case of *Miami Herald Publishing Company v. Tornillo*, 418 U.S. 241, 49 S.Ct. 2831 (1974), held that the State of Florida could not pass a law requiring a newspaper to provide, free of cost, space for rebuttal by a political candidate that had been denounced by the newspaper in an editorial. The Supreme Court recently ruled, in the case of *City of Lakewood v. Plain Dealer Publishing Company*, 108 S.Ct. 2138 (1988) that a city, by ordinance, could not ban the newspapers' right to place coin operated distribution boxes upon the streets of the city simply because such racks or boxes interfered with the aesthetic qualities of the city's neighborhoods.

5. Early on in the development of the wireless broadcast of radio and television, the Courts established that both of these mediums were entitled to claim First Amendment Protected Rights. However, even though they

enjoyed First Amendment Protections, the Supreme Court ruled that access to these mediums could be controlled in spite of the First Amendment protected guarantees because governmental interests were served by the allocation of a limited number of broadcast frequencies that are technically available.

6. Based upon the evidence submitted in this case and upon decisions of Federal Courts interpreting the extent of First Amendment Protected Rights to be afforded cable television system operations, the Court must conclude that cable television system operators and subscribers are not entitled to claim the broader First Amendment Protected Rights afforded to the print media. The Eighth Circuit Court of Appeals in *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 Fed. 2nd 711 (8th Circuit 1986), determined that more governmental regulation of the cable medium may be permissible because, among other things, cable requires use of public ways and enjoys universal access to the home. The Court relied for its decision upon the United States Supreme Court's opinion in *Los Angeles v. Preferred Communications, Community Communications v. City of Boulder*, 660 F.2nd 1370 (10th Circuit 1981), and *Omega Satellite Products v. City of Indianapolis*, 694 F. 2nd 119 (7th Circuit 1982). The Eighth Circuit in *Central Telecommunications, Inc.* also determined that different communications media can be treated differently for First Amendment purposes.

7. Unquestionably, a State may subject any business entity that is afforded First Amendment Protected Rights to taxes imposed by the State. However, similarly situated entities must be treated the same. The Court finds that cable television programming requires a cable systems use of public property, which along with the distinct and unique benefits gained by cable from use of that property, distinguishes for constitutional purposes cable television from other communications media. The same is true in comparing cable television to wireless television or radio

broadcasting, in addition to the fact that there are no "gross receipts or gross proceeds" generated by wireless television or radio broadcasting on which the State sales tax could be imposed.

8. In the case of *Arkansas Writers' Project, Inc. v. Ragland*, 107 S.Ct. 36 (1987) the United States Supreme Court was faced with the question of the discriminatory applicability of Arkansas' sales tax. There, because the proceeds realized from the sale of certain magazines of a special content were exempted from Arkansas' sales tax, while other general interest magazines were subjected to the sales tax, the Supreme Court specifically held:

> "The Arkansas sales tax cannot be characterized as nondiscriminatory because it is not evenly applied to all magazines."

In that case, the Supreme Court held that the general sales tax was discriminatory because it was targeted at only a small group of magazines. Such case does not adversely affect the tax at issue in the present case. Arkansas' general sales tax is evenly applied to all cable television services and operations and is content-neutral. No small group of cable television operators is targeted by the tax. The same factual considerations make the specific ruling in *Minneapolis Star and Tribune Company v. Minnesota Commissioner of Revenues*, 103 S.Ct. 1365 (1983) inapplicable to the facts of the present case. No "special" tax is involved in the case at bar, nor does the tax operate unevenly on cable television operators or services. The extension of Arkansas' general sales tax to charges for cable television service was not an attempt to single out a business entity claiming First Amendment protected rights. The general sales tax applies to sales of tangible personal property and a variety of sales of services.

9. The case of *U.S. v. O'Brien*, 391 U.S. 367 (1968) establishes the test for determining whether governmental

regulation is sufficiently justified under the First Amendment. The Court there held that:

> 1. The regulation must be within the constitutional power of the government;
> 2. The regulation must further an important or substantial interest;
> 3. The regulation must be unrelated to suppression of free expression;
> 4. Any incidental restriction of First Amendment Freedoms must be no greater than necessary to furtherance of the governmental interest.

The raising of revenue is an important or substantial governmental interest. It has never even been argued that the tax on sales of cable television service is suppressive of free expression. It has never been questioned that the power to tax is within the constitutional power of the government. Finally, the tax on sales of cable television service goes no further than is necessary to achieve the important or substantial governmental interest.

10. Based upon the evidence presented in this case and the applicable law, this Court finds that the plaintiffs challenge is not well taken and should be denied. The statutory scheme of state and local sales taxation at issue does not discriminatorily apply the sales tax, nor is there any "facial" discrimination.

11. Because the Court has decided that the challenged sales taxes are constitutionally valid, the Court dismisses plaintiffs' First Amendment claims. The plaintiffs' Equal Protection claims are also denied, because the sales tax is rationally related to a legitimate governmental interest. That is the test prescribed by *Streight v. Ragland*, 280 Ark. 206, 655 S.W.2d 459 (1983), and the test has been passed in this case.

Entered this 10 day of March, 1989.

/s/ Lee A. Munson
Lee A. Munson
Chancellor

APPENDIX E

Office Of The Clerk
Supreme Court Of The State Of Arkansas
Arkansas Court Of Appeals
Justice Building
625 Marshall Street
Little Rock, Arkansas 72201

January 11, 1993

Eugene G. Sayre
Attorney-at-Law
425 West Capitol Avenue
3400 TCBY Tower
Little Rock, Arkansas 72201

Re: 89-89 Daniel L. Medlock et. al.
v. James C. Pledger, Commissioner
of Revenue et. al.

Dear Mr. Sayre:

The Supreme Court made the following order in the above-styled case today:

"Petition for Rehearing is denied. Dudley J., not participating."

Sincerely yours,

/s/
LESLIE W. STEEN, CLERK

cc: Rick L. Pruitt
James M. McCord
Larry D. Vaught
Joe Hardin
Alice Holcomb, Clerk
(#87-2401)
Frank J. Wills, III

APPENDIX F

Selected Portions Of The
Cable Communications Policy Act Of 1984
(As In Effect On July 1, 1987, And July 1, 1989)

§ 542. Franchise fees

(a) Payment under terms of franchise

Subject to the limitation of subsection (b) of this section, any cable operator may be required under the terms of any franchise to pay a franchise fee.

* * *

(g) "Franchise fee" defined

For the purposes of this section --

(1) the term "franchise fee" includes any tax, fee, or assessment of any kind imposed by a franchising authority or other governmental entity on a cable operator or cable subscriber, or both, solely because of their status as such;

(2) the term "franchise fee" does not include --

(A) any tax, fee, or assessment of general applicability (including any such tax, fee, or assessment imposed on both utilities and cable operators or their services but not including a tax, fee, or assessment which is unduly discriminatory against cable operators or cable subscribers);

APPENDIX G

Selected Portions Of The
Arkansas Gross Receipts [Sales Tax] Act Of 1941
(As In Effect On July 1, 1987, And July 1, 1989)

26-52-101. Title

This act shall be known and cited as the "Arkansas Gross Receipts Act of 1941."

* * *

26-52-301. Tax Levied.

There is levied an excise tax of three percent (3%) upon the gross proceeds or gross receipts derived from all sales to any person of the following:

* * *

[Subparagraph (D) below is as amended by Act 188 of 1987 and effective for periods from July 1, 1987, through June 30, 1989.]

(3)(D) Service of cable television provided to subscribers or users including all service charges and rental charges, whether for basic service or premium channels or other special service, and including installation and repair service charges and any other charges having any connection with the providing of cable television services.

[Subparagraph (D) below is as amended by Act 769 of 1989 and effective for periods after July 1, 1989.]

(3)(D)(i) Service of cable television, community antenna television, and any and all other distribution of television, video, or radio services with or without the use of wires provided to subscribers or paying customers or users, including all service charges and rental charges, whether for basic service, premium

channels, or other special service, and including installation and repair service charges and any other charges having any connection with the providing of the said services.

(ii) The tax levied by this section does not apply to services purchased by radio or television companies for use in providing their services.

APPENDIX H

Excerpts From The Transcript Of
The Oral Argument Before
The Arkansas Supreme Court, On Remand

IN THE SUPREME COURT OF ARKANSAS

DANIEL L. MEDLOCK, ET. AL. — APPELLANTS

v. — NO. 89-89

TIMOTHY J. LEATHERS, Commissioner of Revenues; ET. AL. — APPELLEES

CITY OF FAYETTEVILLE, ARKANSAS — INTERVENOR

TRANSCRIPT OF ORAL ARGUMENT ON REMAND

(SEPTEMBER 28, 1992)

* * *

SAYRE: I believe that the Court has already decided the controlling issue in this case in its first opinion written by Justice Newbern and that is that the sameness of identity in the classification of these people who are complaining, as compared to those who are in the class of subscribers to the same television programming except they receive it through the method of the scrambled satellite service. Each pays a subscription fee, each gets the same programming, they come through the satellites, the only difference is that there is a decoder and up to 68,000 people in one instance off of one decoder, and the other one there is only one subscriber off of each decoder. Otherwise, these class members are identical to those who subscribe through the other method of the scrambled satellite service. I would also point out that the Virginia Supreme Court, shortly after the decision in *Medlock*, reached the same conclusion in the *Cox Cable* case, which we've

mentioned that is now on remand in the trial court in Norfolk presenting exactly the same issue.

The Equal Protection test with regard to a tax case; we realize that this Court and the U.S. Supreme Court give wide discretion and deference to the decisions of the Legislature for the purpose of meeting local economic needs. However, there are objective tests that are applied and the first of those is that there must be a legitimate state purpose for the imposition of the tax and we have admitted that with regard to the raising of revenue. The second part of the test is that the classification must be rationally related or have a rational basis to that state purpose. And that is the bone of contention between the parties here. The objectiveness of these standards of the rational basis test are cited in the brief, as cases both by this Supreme Court, by the U.S. Supreme Court, and by other state supreme courts, but they are basically that the classification must rest upon some real and not feigned difference. Secondly, the distinction must have some relevance to the purpose for which the classification was made. And third, the difference in treatment is not so disparate, as to be wholly arbitrary. And they talk in terms of invidious discrimination. In this instance the record is clear that the dander of the cable operators and cable subscribers was raised when they were picked out from amongst other forms of electronic media to be subjected to this tax and that's why this suit was brought.

This Court, I believe, has slightly strayed from this test. And we have mentioned this on brief, with regard to the two decisions in *Bosworth* and *Streight v. Ragland*, where it has been stated that this Court has a duty to hypothesize any conceivable or possible reason to justify the classification. I would ask you, as we did on brief, to take this opportunity to clarify that and to strike that opinion, or those opinions which were written by appointed justices. But, we submit that is unfair that we don't have a chance to argue or to rebut that, if the test is for the Court to hypothesize. It's for the parties to hypothesize and the Court to determine and we cited you to the *Metropolitan Life Insurance v. Ward* decision by the Supreme Court, which remanded for that type of thing where the two reasons that were put forward were

deemed not sufficient. Really, the bottom line test for Equal Protection is are all members within the classification treated equally. This is what Chief Justice Rehnquist ruled in the *Allegheny Pittsburgh* coal case with regard to the property tax, and this Court ruled in the *Larey v. Continental Southern* case in 1967 with regard to the tax on the fuel.

* * *

JUSTICE GLAZE: Does there have to be proof?

SAYRE: I'm sorry?

JUSTICE GLAZE: Does there have to be proof?

SAYRE: I think there has to be proof on which the Court could not simply speculate or hypothesize -- there has to be some determination -- some relation to the record. Yes, Justice Glaze.

JUSTICE GLAZE: Well, the U.S. Supreme Court has used language like, to show that a statute is arbitrary, if a discrimination is founded upon reasonable distinction or if any state of facts reasonably can conceived.

SAYRE: I understand.

JUSTICE GLAZE: Then you had mentioned the hypothesize language that you said crept into our later decisions where special justices were in and you'd like to have that stricken.

SAYRE: I'd like to have that extracted.

JUSTICE GLAZE: Why isn't the hypothesized language used in those decisions like the conceivable language that's used in the United States Supreme Court decisions.

SAYRE: Because I believe, Justice Glaze, that it relies on some aspect of the record. And I again cite you simply to the record the *Metropolitan Life* case from Alabama, where they made

the differential treatment of life insurance companies, and they found the tax to be illegal and remanded it. I would simply like to mention --

* * *

JUSTICE GLAZE: Mr. Sayre, are we going to have to reverse the *Streight* case and the *Bosworth* case to do what you want to do in this case?

SAYRE: No, I think simply the retention of the any conceivable purpose based on the record, as opposed to hypothesizing, and the following of the cases of this Court, such as *Larey v. Continental Southern*, certainly can reverse the court and affirm what this Court did the first time, but on Equal Protection, as opposed to First Amendment, purposes.

* * *

JUSTICE NEWBERN: Unless it is discriminatory?

MR. PRUETT: Well, that's the limiting language. Is it discriminatory?

JUSTICE NEWBERN: I'm like Justice Glaze. It seems to me you have to get down to the question of discrimination here sooner or later.

MR. PRUETT: Of course there is, under the *Madden* rationale, the wide discretion accorded to the taxing authority to create the class that it wishes to tax. In this particular case, the creation of that classification was cable television services and within that classification, there is no discrimination. All of those are treated exactly the same.

Now, Mr. Sayre cited to some other cases that, I think the *Allegheny Coal* case being one of those where he cites some objective standards. When you look at the *Allegheny Coal* cases and cases of similar ilk, you have a classification in that case

created by the West Virginia Constitution consisting of all real property located within the State of West Virginia. And then for purposes of looking at that classification, to see if under the Equal Protection analysis everyone was treated identically or substantially the same, it was very apparent from the taxing, from the results of the assessments, that there was disparate treatment -- invidious discrimination within that classification, because number 1 -- if you had a transaction on -- an arm's length transaction and real property, that had occurred within the last ten years, then you're only assessed 50% of the value. But, if you were beyond or if you had not had an arms length transaction, then looking at the property valuation of the property was from 8 to 35 times the same value of similarly situated property in other counties. So just looking at the classification, there was a discrimination. There is nothing before this Court, as far as the classification of cable television services, to show that within that classification there is any type of discrimination.

JUSTICE BROWN: In this case, is there any rational basis for the classification, other than the revenue raising and the oversight argument? Is there anything, really, to show that *Streight v. Ragland* and *Bosworth* have been complied within that regard?

MR. PRUETT: Of course, the Court has to realize how this matter comes to the Court. Tremendous effort -- as Mr. Sayre has alluded to -- was developed by the Appellant addressed to its First Amendment arguments. Almost nothing was given at the trial level addressing the Equal Protection argument, because, at the time that this matter was heard by the lower court, Mr. Sayre's strongest argument, obviously, was the First Amendment argument. But this Court is not bound by the record of this case, because of the "hypothesizing standard" that was announced in the *Streight v. Ragland* case.

JUSTICE GLAZE: Now that's what Mr. Sayre takes exception to.

MR. PRUETT: I understand that.

JUSTICE GLAZE: He believes that there ought to be some sort of evidence in the record somewhere by the state -- and I don't really even see in your brief -- I saw in Mr. McCord's brief that he raised some sort of legitimate purpose in it, but you don't seem to even attempt to address that point, which I think is kind of crucial, at least on the Equal Protection part. I sure hope you deal with that --

MR. PRUETT: The reason that it was not dealt with in the brief was that we knew that we would be here arguing based on past consideration of this case by the Supreme Court, and we decided that we would submit our Equal Protection rational bases in the oral argument. So, to answer your question, Justice Glaze, it is a matter of strategy more than anything else. But there are --

JUSTICE GLAZE: Are you going to adopt the City of Fayetteville's or Mr. McCord's suggestion and rationale that would sustain?

MR. PRUETT: Certainly, certainly, sir. He makes a distinction based upon urban versus rural nature of individuals that would be receiving the satellite transmissions. Primary thrust of that argument being that you have isolated segments of rural community that are in need of communications, need of information, such that there is a rational basis for not extending the tax to those folks. This way that there is a perhaps a better economic ability on the part of rural owners to receive that type of information, as opposed to urban dwellers that have easy access to the cable system itself. So, yes sir, we certainly do adopt that.

There are other rational bases why the law should be sustained. If you consider that the service of cable television was a newly emerging industry at the time this matter was being considered by the Arkansas Supreme Court and that that industry only came into existence because of the advent of some new technology, the ability to broadcast signals and have those signals rebroadcast by satellite to users on the ground, I think you would realize that there are distinctions early in the cable industry that can be made, because of the amount of investment that has to take

place concerning purchasing a cable television technology in order to broadcast that technology through wires and the cost of that same type of satellite receiving dish antenna to individuals that are, what I would call, isolated users.

JUSTICE GLAZE: Could I ask you a question at this point -- and you're right on the points that I'm interested in, but the two purposes or rationale that have now been offered; should there be some sort of evidence presented by the parties below? Should we not have had some of the development of the purpose background for us to review up here, rather than to let the parties for the first time get before us, and then we have to hypothesize, as our language is expressed, some rationale?

MR. PRUETT: And again, that goes to Mr. Sayre's development of his First Amendment Argument almost exclusively at the trial court level.

JUSTICE GLAZE: But my answer to that -- why wouldn't we send this thing back, under the circumstances, since the U.S. Supreme Court has told us we are all wrong on the First Amendment and let you develop the Equal Protection argument?

MR. PRUETT: This is somewhat circular, but you do have the hypothesizing standard, and it really serves no useful purpose to remand this back to the trial court for the parties to brief the matter or obtain additional testimony. The stated purpose of the Act is to raise revenues. We do have in the record, uh, --

JUSTICE GLAZE: That is not enough. That's not enough.

MR. PRUETT: Well, it probably is not, your Honor. But again, the Court can hypothesize under the *Streight v. Ragland* analysis why the General Assembly carved out the classification of cable television services, as opposed to the wireless transmission, as being the classification which it sought to tax. So there's really no need under this standard to remand it for what I perceive

basically is, you know, just a few more briefs that will eventually make it back here for oral argument.

JUSTICE BROWN: Doesn't that become perilously close to rationalizing after the fact? In other words, I assume your position is that what the state intended to do was embrace all cable television and slipped up in this regard. Did not include the scrambled satellite entities. And then realizing the mistake, brought them in?

MR. PRUETT: Well, there is --

JUSTICE BROWN: Did the state -- in your argument -- you didn't put before us a rational basis. Isn't the state really saying that under *Madden v. Kentucky* that maybe a rational basis isn't necessary in this case? -- in a case such as we have here?

MR. PRUETT: Well, I hadn't thought of it exactly in that regard. You know, for purposes of remand, we were directed to address the Equal Protection argument and then the hypothesizing standard, of course, comes in to allow us to flesh out perhaps the insufficient record.

JUSTICE BROWN: Well, you have this wide deference obviously. You've presented no rational basis.

MR. PRUETT: Well, we did not do so by way of written brief, but there are the rational bases out there that we are articulating now and it has been articulated by the City of Fayetteville in order to sustain those. The burden in this matter is that if you can conceive of a rational basis, then, of course, the law will be sustained, under the Equal Protection rational basis analysis. We would submit that there are bases for sustaining the classification made by the General Assembly. Isolated users out there had already paid significant amount of tax on purchasing the satellite reception technology, that users in urban areas had access to cable systems, and did not have to spend money and pay tax on initially tremendously expensive systems.

JUSTICE BROWN: Isn't there something slightly wrong about conceiving this after the fact and maybe putting this together, building it up out of whole cloth or plucking it out of the air?

MR. PRUETT: It certainly is fanciful, I would agree. To some extent. However, the Court, under its "hypothesizing standard," which is good law and I realize that it's been issued in the past by special justices, but it's nonetheless the rule of law applicable to this case. We do not consider it to be suspect just because it was issued by special justices. And, of course, we would ask the Court to continue to adhere to that line of reasoning through the *Streight* and *Bosworth* and other subsequent cases.

Another problem, you honor, may have been that the owners of satellite dish antennas were not in the mainstream of the tax collection process and that, merely as isolated users out there, that the state would have had to develop some type of collection mechanism to make these individuals out there subject to the tax and to be able to collect it. There is a possibility that the General Assembly determined that that would not be cost effective -- that extending the tax to those isolated users not in the mainstream retail system, that trying to collect the tax, it would have been impossible to enforce and any revenue generated by it might not have been sufficient to pay for the administration itself.

JUSTICE NEWBERN: That seems to me to suggest, Mr. Pruett, that the General Assembly can discriminate among taxpayers based upon a reason which has no specific relationship to their relationship to each other. In other words, that the General Assembly can discriminate between taxpayers based on how much it would cost to collect a tax? That seems to be me to be a problem, because, if they can do that, then it could really treat people in an unequal manner based on nothing that has to do with those people -- based solely on its own inability, for example, as you put it, to collect a tax, is that possible?

MR. PRUETT: Your honor, it goes back to the classification. Again, the *Madden* rationale, which is a good law which was quoted in the remand and also subsequently, has also

been quoted in the *Bosworth* decision by this Court, still affords a latitude to the taxing authority to make classifications. And my answer to your question directly is that the classification that was made consisted of cable television services and it did not sweep in this wireless transmission, that came about in 1989. And for purposes of that classification, that's proper for the General Assembly to do that and there is no evidence indicating that there is any disparate or invidious discrimination in that classification.

JUSTICE NEWBERN: The language of the *Allegheny* case that you have referred to at one point is that a state may divide different kinds of property into classes and assign to each class a different tax burden, so long as those divisions and burdens are reasonable. In an instance such as you propose, would the burdens be reasonable? To impose that burden upon people like the state can get to and not on those that cannot? Is that a reasonable assignment of burdens?

MR. PRUETT: I believe it is. It's a judgment call -- always on the part of legislature in order to determine how much it is to sweep within a classification or what exceptions it has to carve out. You know as well as I do if you go to the Tax Code, there are, you know, broad taxes and then there are exceptions. That latitude is afforded the legislature.

JUSTICE NEWBERN: But, the exceptions should have something to do with the taxpayer, rather than the tax collector, should they not?

MR. PRUETT: Well, the burden upon the tax collector, I think, is also something that has to be factored. There is kind of a cost analysis, I think, that always has to be considered in regards to administration of a tax law.

JUSTICE NEWBERN: Thank you.

MR. PRUETT: Thank you.

* * *

SAYRE: May it please the Court, I've got less than three minutes, but I would like to point out that the "hypothesizing standard" leads to exactly what you all were discussing with Mr. Pruett, and that is the after the fact thinking up of some reason. And not only after the fact, but after a year of briefing and waiting for oral argument, we get down and I've got two minutes and 40 seconds to respond to a tax collection method and something else on the rural information.

The state had an opportunity at trial to introduce evidence. We didn't just introduce evidence on the First Amendment. We introduced a broad evidentiary record showing the discrimination. We argued all of the four methods -- or four reasons -- and we are now back to this Court to expand our Equal Protection argument. The state had its opportunity to put forth these, and to put evidence in, and to show some basis that is related to this record. I would ask that -- it's too late in the day to raise that with two minutes to go in oral argument for rebuttal and time to think and to respond to those. The time was five years ago when the evidentiary record was being built.

But the other thing is as Justice Glaze said, if that is the case, and if this "hypothesizing standard" must have some relation to the record, then, yes, remand it and let us expand, as the *Cox Cable* case did in Virginia. But, not to be sandbagged with two minutes to go in oral argument. I would also say that there is a rebuttal by the legislature's own action and that is that if it's tough to collect this tax and it's all these reasons to help people in the rural areas, two years later, they turned around and taxed it. I mean, they have --

CHIEF JUSTICE HOLT: That probably tells us it was an oversight, Mr. Sayre.

* * *